Supreme Court, U. S.
FILED
MAY 16 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1816

METHODIST HOSPITAL OF KENTUCKY, INC. - - - - - - - - - Petitioner

versus

NATIONAL LABOR RELATIONS BOARD
AND
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO - - - - - - Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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No. _____

METHODIST HOSPITAL OF KENTUCKY, INC., - *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD and
COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO - - - - - - *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Methodist Hospital of Kentucky, Inc. (hereafter called "the Hospital"), by counsel, hereby petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit rendered in the above-captioned case on March 20, 1980.

OPINIONS BELOW

The original opinion of the Court of Appeals of March 20, 1980, is reproduced in Appendix A hereto (pages 17-33) and is reported at —— F. 2d ——, 88 CCH Lab. Cas. ¶11,971 (6th Cir. 1980). That opinion

was amended by an Order entered by the Court below on April 23, 1980, which is also reproduced in Appendix A to this petition (pages 34-35). The opinions and orders of the administrative law judge and the National Labor Relations Board in this case (which were enforced by the Court of Appeals) are reproduced in Appendix B hereto (pages 36-102) and are reported at 221 NLRB 692 (1975) and 227 NLRB 1392 (1977).

JURISDICTION

The aforesaid judgment of the Court of Appeals was dated and entered on March 20, 1980. (Appendix A, page 17). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and 29 U.S.C. §160(e), and the Court of Appeals had jurisdiction of this case under Section 10(e) and (f) of the National Labor Relations Act, as amended, 29 U.S.C. §160(e) and (f), since the Hospital petitioned it for review of the Board's decisions and the Board filed a cross application for enforcement of its decisions.

QUESTION PRESENTED FOR REVIEW

Whether it is a violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. §158(a)(1) and (3), for an employer (such as the Hospital) to reject job applicants (or to discharge or lock out and replace employees) as a group because of their participation in an extremely violent labor dispute which occurred prior to the time when the Act became applicable to the employer, even though

the employer is unable to identify individual applicants or employees as having personally engaged in violence themselves.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 1792, 29 U.S.C. §151, et seq.) are set forth verbatim in Appendix C hereto (pages 103-106.)

STATEMENT OF THE CASE

A great many of the facts in this case are set out in the opinions of the Court of Appeals, the Board and the administrative law judge. However, we believe it is in order to very briefly review those facts for the benefit of this Court.

The Hospital is located at Pikeville, Kentucky, and its alleged unfair labor practices occurred there. Since Pikeville is within its geographical jurisdiction, the Sixth Circuit had jurisdiction of this case under Section 10(e) and (f) of the National Labor Relations Act, as amended, 29 U.S.C. §160(e) and (f).

As the Sixth Circuit found, the Board's decisions "are the product of a labor dispute which commenced on June 10, 1972, when employees of petitioner Methodist Hospital of Kentucky, Inc., went on strike to obtain recognition of the intervening union, Communications Workers of America, AFL-CIO." At that time, the Hospital was not subject to the National Labor Relations Act, since it is a non-profit institution.

However, it became subject to the Act by virtue of the Health Care Amendments thereto (Act of July 26, 1974, P.L. 93-360, 93rd Cong., 2nd Sess., 88 Stat. 395) which became effective on August 24, 1974. (Appendix, A, pages 17-18.)

"The strike was discontinued by the union on October 10, 1974 . . . The hospital, however, refused the union's request to reinstate the approximately 200 nonprofessional employees [who had gone on strike] to their former positions or to accept them as applicants for employment." (Appendix A, page 18.)

The Sixth Circuit reversed the Board and held that the Hospital was not obligated to *reinstate* the strikers to their old jobs, because they had been terminated prior to the date the Hospital became subject to the Act. (Appendix A, pages 32-33.) However, the Sixth Circuit affirmed the Board's conclusion "that the employer's refusal to hire the strikers as new employees violates Section 8(a)(1) and (3) of the Act" (Appendix A, page 32), thus rejecting the Hospital's defense that its refusal to hire the strikers as new employees was justified by the extreme violence during the strike by the Union and its supporters (Appendix A, pages 22-24).

That violence was part and parcel of the strike from its very outset. The Hospital's Administrator and Director of Nursing arrived at the Hospital about 10:30 P.M. on June 10, 1972, just before the shift change time of 11:00 P.M., and found from 75 to 100 Hospital employees blocking the driveway entrance. The employees who were scheduled to report to work

at 11:00 P.M. did not do so, except for nine registered nurses and licensed practical nurses who crossed the picket line to return to work. (A. *195-198, 220, 222, 278-280, 285.)

The Hospital had a total of 134 inpatients that day, including 89 who were in fair condition, 6 in poor condition, 12 whose condition was serious and 4 who were critical. Three were in the Hospital's Intensive Care Unit. Of the four patients in critical condition that night, one died at 8:15 A.M. the next day, June 11, and another died at 1:45 P.M. on June 12. See Respondent's Exhibit 16, the Hospital's patient census for that day. Moreover, 17 patients came to the Hospital's emergency room between 11:00 P.M. on June 10 and 7:30 A.M. on June 11, of whom seven were admitted as inpatients. See Respondent's Exhibit 17, a list of the emergency room admissions during that period of time. (A. 198-199, 202, 428-430.)

There were immediate adverse results of the strike. The Hospital was obliged to close down its Intensive Care Unit and move those patients to another location. That unit remained closed until October, 1975. In addition, the Hospital closed its entire fourth floor, which had 40 beds, and this floor was not reopened until July, 1973. At a medical staff meeting a plan was devised to discharge those patients whom it was medically feasible to get out of the Hospital, and a policy for the admission of emergency cases only was also formulated. (A. 199-201, 203, 282-283, 285-286.)

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*References in this petition to "A" are to the pages of the Appendix filed by the Hospital with the Sixth Circuit.

The common carriers who served the Hospital refused to cross the picket line to deliver the drugs, medical supplies, equipment and food which the Hospital required in its operations. Point Express, the primary common carrier serving the Hospital, stopped making deliveries to the Hospital anywhere in Pikeville, thus forcing the Hospital to travel 45 miles to the Point Express warehouse to pick up its shipments. Point Express did not resume deliveries to the Hospital until after the Union's picket line was removed on October 10, 1974. (A. 204-205, 271.)

Throughout the entire twenty-eight months of the strike, Hospital employees, patients and visitors who passed back and forth through the picket line were bombarded with such insults from the pickets (former Hospital employees) as "scab," "yellow dog," "son of a bitch" and "whore." This abuse was accompanied by obscene and threatening gestures. There were always large crowds of pickets at the only entrance to the Hospital, and pickets told persons attempting to cross the picket line that they could not go through it and that they "would be sorry." Tacks, nails and broken glass on the Hospital's driveway in the vicinity of the pickets were practically a daily occurrence. The lighting at the entrance to the Hospital was also broken out. False fire alarms were a regular occurrence both night and day, and patients were disturbed by the fire trucks responding to these false alarms. (A. 220, 222-223, 244, 287-289, 295-296, 300.)

There was vandalism to the property of Hospital employees out in the town. The Director of Nursing's

car was "painted" and eggs were thrown all over her patio. Two nuns who were working for the Hospital as licensed practical nurses had acid poured over their car, and shortly thereafter they quit work. Other employees' cars were "painted" at their homes, their windshields were broken out and their tires were slashed. This vandalism happened so often to some Filipino nurses who were working for the Hospital and living in Pikeville that the Hospital finally bought six mobile homes and installed them at the rear of its premises for their residences. The Hospital also used its seventh floor to house employees who desired to stay on the premises because they were afraid to cross the picket line. (A. 206-207, 223-224, 286, 290-293.)

The Hospital received numerous bomb threats which were made to its switchboard, sometimes as many as five or six a day. The State and City Police and the Pike County Rescue Squad were called in to search the building when these calls were received, and the law enforcement officers searched every room of the Hospital, including the patients' rooms, regardless of whether it was day or night. Needless to say, these searches upset the Hospital's patients and staff, as they were obviously calculated to do. (A. 224, 296-299.)

These telephone bomb threats continued throughout the strike, except for one period when the telephone company put in tracing equipment on the Hospital's switchboard. *That equipment was installed by members of the Union employed by the telephone company.* The bomb threats stopped immediately after the tracing equipment was installed, but they resumed in full

force when that equipment was later removed. (A. 225, 297.)

Firecrackers or cherry bombs were exploded in a first floor restroom of the Hospital. On one occasion, the Hospital's main telephone lines were either shot out or blown off, leaving the Hospital without its regular outside communications for 12 to 15 hours. Also, one of the mobile homes for the nurses at the Hospital was set on fire externally, and some nurses' housing in town was set on fire when gasoline was thrown on it. *Both of these fires were caused by arson.* (A. 225-226, 229-230, 299.)

Further with regard to the bomb threats to the Hospital, there were two explosions on its grounds during the strike. One of them occurred just forty yards from the nurses' mobile homes. The other explosion happened one Saturday night at the rear of the Hospital, at a point only fifty feet from a liquid oxygen tank which can be seen in the center of Respondent's Exhibit 2, between a wing of the Hospital and some parked cars. That is a pressurized bulk storage tank which provides the Hospital's patients and medical staff with oxygen. This tank is only fifty or sixty feet from the Hospital's Pediatric *(Children's)* Wing, *in which there were patients at the time of the explosion.* As a result of that explosion, some patients called their physicians and asked to be discharged from the Hospital. Just like the fires, these explosions were investigated by law enforcement authorities, who reported that *they were caused by dynamite.* (A. 226-230, 377.)

There were also two mass demonstrations or riots at the Hospital during the strike, in which former employees participated. One was in November, 1972, when some 75 persons marched down the Hospital's driveway and through the Hospital's lobby door. Not only did former employees participate in this demonstration, but also *several of the placards which they were carrying at the time had the legends "CWA" or "Recognize CWA" on them.* It was necessary for the Hospital to call the State Police to evict these "demonstrators" from its property. (A. 230-232, 253-254.)

An even worse riot occurred in April, 1974, when again approximately 75 persons carrying placards marched down the Hospital's driveway and tried to storm the lobby doors, which had been locked when word of the impending riot was received. Just as before, the State Police were called to get the demonstrators off the Hospital's property. However, this time a fight broke out between the demonstrators and the three policemen who answered the first call, and it was necessary to call in additional police in order to quell the riot. *As a result of this riot, a police captain was injured, and approximately six demonstrators were arrested.* See Respondent's Exhibits 21A, B and C, newspaper accounts of this riot. The Hospital's Administrator personally observed this riot and *saw several former Hospital employees among the demonstrators.* (A. 232-234, 254-255, 267, 456-467.)

The fact of the matter is that the Hospital and its employees never suffered any such abuse, vilifications, threats, coercion, violence and vandalism before the

Union's strike, nor have they been subjected to any such activities since the Union called off the strike in October, 1974. However, those activities continued unabated all during the strike. In fact, it was necessary for the Hospital to seek a State Court restraining order because of the mass picketing and violence. (A. 220, 235, 250-251, 301.)

The Union and several of the strikers, including Board witnesses Mary Ann James *(the Union's Chairman)* and Achilles Williams, were found guilty by the Kentucky courts of certain unlawful acts of mass picketing and violence during the strike. See Respondent's Exhibit 15, a certified copy of the pertinent papers in this regard in the injunction suit brought by the Hospital against the Union and the strikers in the Pike Circuit Court in a futile and fruitless effort to stop the mass picketing and violence during the strike. (A. 221, 406-427.)

The Sixth Circuit concluded "that there was substantial evidence of violence and misconduct in connection with the strike. The activity complained of included bomb threats, disruption of the telephone lines from the hospital, explosions on hospital property, the throwing of gasoline on property from which fires were started, mass demonstrations upon the hospital and other acts which can only be characterized as violent, unlawful and unprotected activity." (Appendix A, page 22.) The Court did not mention it, but *the record in this case is devoid of even one word by the Union or any of the strikers repudiating or disavowing that violence.* We further submit that the unlawful con-

duct of the Union and the strikers in this case is particularly reprehensible because it was directed at a hospital and its sick and injured patients.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

The decision in this case by the Sixth Circuit with respect to the Hospital not hiring the strikers as new employees merits review by the Supreme Court within the criteria prescribed by Rule 19 of the Revised Rules of the Supreme Court of the United States because that decision is in conflict with decisions of the Fourth and Fifth Circuits on the same matter in similar cases, that decision has decided an important question of federal law which has not been (but should be) settled by the Supreme Court, and that decision has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

In this case, the Court below found and held that ". . . the company has specifically declined to attribute any specific act to any specific employee, preferring to rely upon general allegations of misconduct. At the same time we are unwilling upon these proofs to disturb the well settled rule in our Circuit that the vicarious imposition of sanctions for violence will not be enforced absent proof that a particular individual was engaged in the unprotected activity." (Appendix A, page 23. See also, Appendix A, page 32.)

That conclusion is diametrically opposite from the rulings on the same point in *Johns-Manville Products*

Corporation v. *N.L.R.B.,* 557 F. 2d 1126 (5th Cir. 1977), *cert. den.* 436 U. S. 956 (1978), and *A. S. Abell Company* v. *N.L.R.B.,* 598 F. 2d 876 (4th Cir. 1979). In *Johns-Manville,* the Court overruled the Board and found that an employer acted lawfully in locking out and permanently replacing its employees who had engaged in a very violent, destructive in-plant strike, even though the employer "could not identify a single worker who participated in the alleged strike". (Wisdom, C.J., dissenting.)

Even closer to the point, the employer in the Abell Case refused to employ a job applicant who had participated in a violent strike at another firm, despite the fact that the employer had no evidence of the job applicant being guilty of violence himself. The Board found that the employer thus acted unlawfully, but the Court reversed the Board on the basis of the violence during the strike. In doing so, the Court stated that it would have been "at least incautious" for the employer to hire the applicant in view of the "holocaust" created by the union during the strike. Moreover, the applicant's participation in the strike "surely was far from reassuring that his presence [in the employer's plant] was not to be feared", and the employer could consider his strike participation because "of the prevailing uncertainty of [the union's] trustworthiness." In short, there was "proof teeming of the [employer's] 'valid, substantial business justification' for the refusing" of the job application, citing *Johns-Manville.*

This is a question of major importance to both employers and unions. As it stands now, employers within the jurisdiction of the Fourth and Fifth Circuits can reject job applicants and terminate employees with impunity under the circumstances of this case, while employers in the Sixth Circuit can do so only at their peril. Certainly it is in the vital interest of our national labor policy and laws to get this conflict resolved so that both employers and unions can know where they stand when presented with similar situations.

Furthermore, the necessary result of the ruling of the Court of Appeals in this case is to give *retrospective* application to the Health Care Amendments. As found by the Court of Appeals, the striking employees were *lawfully* terminated by the Hospital long before the effective date of the Health Care Amendments since their activities at that time were *not protected* by the National Labor Relations Act.

Moreover, there is no dispute in the record about why the Hospital, after the effective date of the Amendments, refused to hire the former strikers as new employees. That reason was because its former employees had participated in a strike which was rife with incidents of extreme violence and rehiring the former strikers would cause a disruption in the operations and patient care of the Hospital due to the atmosphere of bitterness between the former strikers and the replacement employees, *and also because, having been lawfully discharged, the former strikers were not*

eligible for reemployment under established Hospital policy.

However, the Court of Appeals found that, by refusing to hire the former strikers as new employees, the Hospital unlawfully discriminated against them because of their *protected* strike activities. That raises the question of what *protected* strike activities did the former employees engage in which allegedly formed the basis of the Hospital's refusal to hire them? Quite obviously, such activities took place before the effective date of the Health Care Amendments, at a time when their activities actually were *not protected* by federal law. There is *no* evidence in the record that the Hospital refused to hire them because of something they did *after the effective date of the Amendments.* Thus, the necessary result of the decision by the Court of Appeals is to apply the Health Care Amendments retrospectively in an *ex post facto* manner and to retroactively grant the sanction of federal law and a protected status to strike activities and to employees *properly* discharged for engaging in those activities.

The retrospective application of the Health Care Amendments is dramatically illustrated by the fact that the Court of Appeals held the Hospital to the same standard which applies to an ordinary strike situation, that is, according to the Court below and the Board, the Hospital could refuse new employment *only* to those *identified* individuals *proved* to have committed serious acts of misconduct. However, during the course of the strike in question, the Hospital had absolutely no reason to anticipate that it would be

called upon to document incidents of violence and misconduct, or to identify those involved in such incidents, and yet a heavy penalty has been imposed upon the Hospital for not having done so. In other words, both the Sixth Circuit and the Board have caught the Hospital in a trap by the exercise of hindsight, even though everything the Hospital did was perfectly legitimate under both federal and state law at the time it was done.

The Supreme Court has never decided this issue. It was not presented to the Court or discussed in *Phelps Dodge Corporation* v. *N.L.R.B.,* 313 U. S. 177 (1941), the principal case relied upon by both the Sixth Circuit and the Board on this point. (Appendix A, page 31; Appendix B, page 43.) On the contrary, instead of approving the type of reprehensible and unconscionable conduct which the Union and the strikers engaged in at the Hospital, this Court expressly and specifically held that such conduct was *unprotected* and justified discharge (not to mention refusal to rehire) as long ago as *N.L.R.B.* v. *Fansteel Metallurgical Corporation,* 306 U. S. 240 (1939).

CONCLUSION

It is thus clear that there is a split among the circuits over the question of whether an employer can refuse to hire a job applicant or discharge employees because of their participation in a very violent strike, despite the lack of proof of their personal involvement in the violence. This is a very important question in the field of labor law throughout the United States and one which this Court has never addressed. The im-

portance of this issue is compounded by the fact that here the Hospital refused to hire the former strikers because of their admittedly *unprotected* activities prior to the effective date of the Health Care Amendments to the National Labor Relations Act.

Furthermore, enforcement of the Board's order in this case would result in putting the only hospital in a large area of Appalachia completely out of business.

For all these reasons, we earnestly and sincerely request that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion and Decision of the United States Court of Appeals for the Sixth Circuit, which is reported at ____ F. 2d ____, 88 CCH Lab. Cas. ¶ 11,971 (1980).

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 77-1057

METHODIST HOSPITAL OF KENTUCKY, INC. - *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD - - *Respondent*
COMMUNICATION WORKERS OF AMERICA,
AFL CIO, - - - - - - - *Intervenor*

ON PETITION FOR REVIEW NLRB

Decided and Filed March 20, 1980

Before: EDWARDS, Chief Circuit Judge; ENGEL and MERRITT, Circuit Judges.

ENGEL, Circuit Judge.

The Board orders we review here are the product of a labor dispute which commenced on June 10, 1972, when employees of petitioner Methodist Hospital of Kentucky, Inc., went on strike to obtain recognition of the intervening union, Communication Workers of America, AFL-CIO. Prior to August 25, 1974, non-profit hospitals did not come

within the jurisdiction of the NLRB since they were specifically excluded from the definition of "employer" under Section 2 (2) of the National Labor Relations Act. The strike was still in effect when congressional amendments to the Act, effective on August 24, 1974, removed the Section 2(2) exemption, thereby conferring the protections of the Act upon non-profit health care institution employees.

The strike was discontinued by the union on October 10, 1974. In the meantime, despite inconvenience at the outset and a reduction in certain services, the hospital had remained open, largely through the efforts of new employees hired to replace the strikers. The hospital, however, refused the union's request to reinstate the approximately 200 non-professional employees to their former positions or to accept them as applicants for employment.

In decisions reported at 221 NLRB No. 87 (1975) and 227 NLRB No. 189 (1977) the Board upheld most of the administrative law judge's findings, and determined that the hospital had violated Sections 8(a)(1) and (3) of the Act by: (1) refusing to reinstate strikers to their former positions as vacancies arose after October 10, 1974, the effective date of the union's request for reinstatement, and (2) refusing to hire the strikers as new employees without regard to their former union activity. In addition to the usual cease and desist provision, the Board order affirmatively required the hospital to reinstate the strikers to their former positions without prejudice to seniority and other rights and privileges, and to make them whole for any earnings lost by virtue of the hospital's discrimination.

The additional circumstances, with regard to the cross-petitions for review and enforcement, will be described as they pertain to the issues raised.

I.

The 1974 Health Care Amendments, specifically Section 8(g), 29 U.S.C. § 158(g), provide that before a labor union

initiates a strike against a health care institution it shall give at least ten days prior notice in writing to the employer and the Federal Mediation and Conciliation Service.[1] Further, under Section 8(d) of the Act, 29 U.S.C. § 158(d), any employee who engages in a strike in violation of the ten-day waiting period forfeits, for most purposes, the protections accorded striking employees under the Act.[2]

It is undisputed that no notice was given of the strike, either at its onset or after the effective date of the amendments. The company urges that the notice requirements of Section 8(g) applied to strikes in progress on the effective date of the amendments, and that to avoid the forfeiture of employee status under Section 8(d) the strikers were

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[1]Section 8(g) of the Act, 29 U.S.C. § 158(g) provides:

> A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

[2]Section 8(d) of the Act, 29 U.S.C. § 158(d) provides:

> Any employee . . . who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

required to cease their ongoing activities, serve the appropriate notices and wait ten days before resuming the strike. On this basis it is asserted that the Board had no power to order the reinstatement of striking employees or otherwise intervene in the labor dispute.

While the General Counsel had originally agreed with the company's contention, see 221 NLRB No. 87 at 692-93, the Board reached a contrary conclusion, determining that since the strike began before the effective date of the hospital amendments, "The Health Care institution is already possessed of actual notice and continuity of patient care cannot be further provided for by requiring additional notice." We agree with the Board and with the analysis of this issue in *Woodlawn Hospital* v. *NLRB,* 596 F. 2d 1330, 1342-44 (7th Cir. 1979), where the Seventh Circuit, citing the Board's decision here, observed:

> In *Methodist Hospital,* the Board focused on whether the Act required employees to interrupt an ongoing strike on August 25, 1974 to give statutory notice. The General Counsel had initially published guidelines which advised strikers of the necessity of such an interruption. The Board's rejection of the General Counsel's construction seems eminently reasonable. The purpose of 8(g) is quite clearly to provide advance notice to employers so that they may prepare for the continuity of health care during the strike. S. Rep. No. 766, 93d Cong., 2d Sess., *reprinted* in [1974] U. S. Code Cong. & Ad. News 3948. Notice of a strike that had been ongoing for more than two years on the effective date of the Act would not further the purposes that section 8(g) was designed to foster and thus should not be read as a prerequisite to a strike in progress on the Act's effective date.

We believe that this circuit's position was clearly foreshadowed by our earlier enforcement of the Board's deci-

sion in *Grand Lodge of Free and Accepted Masons,* 220 NLRB No. 226 (1975), *enforced,* 548 F. 2d 1276 (6th Cir.), *cert. denied,* 434 U. S. 822 (1977). There the employer was not a hospital but a non-profit nursing home that had been struck by its employees in February, 1970, prior to the Board's assertion of jurisdiction over such institutions.[3] Since a bargaining agreement was in effect, Section 8(d) required the union to give a pre-strike notice to the Federal Mediation and Conciliation Service 30 days prior to the commencement of a strike when a party to the agreement sought to terminate or modify it. However, no such notice was served before the strike nor after June 2, 1970 when the Board first asserted jurisdiction over the industry. In those circumstances the Board rejected the employer's claim that failure to provide the requisite notice after jurisdiction was asserted rendered the strike illegal *ab initio.* 220 NLRB at 1319.[4] If not identical, the circumstances in *Grand Lodge* are strongly analogous to those here, and the logic applied is equally persuasive.

Therefore, contrary to the company's assertion, we conclude that any rights which the hospital's striking employees have under the Act were not affected by the failure to give the ten-day statutory notice, either before commence-

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[3]The Board first determined to exercise jurisdiction over non-profit nursing homes in *Drexel Home, Inc.,* 182 NLRB No. 1045 (1970), decided June 2, 1970.

[4]Methodist Hospital correctly points to the difference in circumstances between these two cases and further observes that in *Grand Lodge* the employer asserted that Section 8(d)(3) of the Act should have been applied retroactively to the union before the Board asserted jurisdiction over the industry. This is, of course, true. However, the hospital fails to note that in *Grand Lodge,* the Board expressly rejected the employer's claim that, under those circumstances, the union was obligated to call off the strike and proceed in accordance with the provisions of Section 8(d), once jurisdiction was established. 220 NLRB at 1319.

ment of the strike, or after the effective date of the health care amendments.

II.

The hospital claims that it is jusified in refusing to reinstate or rehire the striking employees because the strike was accompanied by acts of violence and other misconduct so egregious that the union lost any right to bargain collectively on behalf of the employees, and that the employees themselves had forfeited any right to reemployment. Our review of the record confirms the hospital's claim that there was substantial evidence of violence and misconduct in connection with the strike. The activity complained of included bomb threats, disruption of the telephone lines from the hospital, explosions on hospital property, the throwing of gasoline on property from which fires were started, mass demonstrations upon the hospital and other acts which can only be characterized as violent, unlawful and unprotected activity. The difficulty, however, is that the proofs fail to identify any particular miscreant and the hospital has specifically declined to offer such proof. Instead, the hospital relies upon unattributed acts of misconduct as its basis for refusing to deal with the striking employees.[5]

The hospital rightfully asserts that in enacting the National Labor Relations Act Congress never intended to compel employers to retain persons whose conduct goes beyond mere protected activity under the Act and extends to unlawful acts of trespass and violence against the employer's property.[6] While we would have no difficulty up-

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[5]The record shows in General Counsel's Exhibit 9 that 37 striking employees were in fact accepted for re-employment. Their rights are not involved here.

[6]*See, e.g., NLRB* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240 (1939); *Raleigh Water Heater Mfg. Co.*, 136 NLRB 76 (1962); *Acrylic Optics Corp.*, 222 NLRB No. 166 (1976).

holding a company decision to refuse employment to any person who was shown to have participated in the more egregious forms of unlawful conduct shown by the proofs here, it is clear that the company has specifically declined to attribute any specific act to any specific employee, preferring to rely upon general allegations of misconduct. At the same time we are unwilling upon these proofs to disturb the well settled rule in our circuit that the vicarious imposition of sanctions for violence will not be enforced absent proof that a particular individual was engaged in the unprotected activity. *See NLRB* v. *Deena Artware, Inc.,* 198 F. 2d 645 (6th Cir. 1952), *cert. denied,* 345 U. S. 906 (1953) (and cases cited at 198 F. 2d 652). *Accord, NLRB* v. *Cambria Clay Products Co.,* 215 F. 2d 48, 53 (6th Cir. 1954); *Kayser-Roth Hosiery Co.* v. *NLRB,* 447 F. 2d 396 (6th Cir. 1971).

The hospital particularly urges us to follow *Johns-Manville Products Corp.* v. *NLRB,* 557 F. 2d 1126 (5th Cir. 1977), *cert. denied,* 436 U. S. 956 (1978), where it was held that unattributed acts of sabotage by employees during the bargaining process amounted to an in-plant strike which justified a lockout by the employer and the hiring of permanent replacements. It is notable, however, that the conduct complained of in *Johns-Manville* v. *NLRB* resulted in the complete shutdown of the plant, whereas here the hospital was able to hire replacement employees and remain in operation. Further, we have not been persuaded that the facts here would justify the abandonment of our long-held concept of accountability in labor disputes, especially since we believe these problems are better overcome by diligent investigation and honest fact-finding processes. Experience has shown that much difficulty can be caused by only a few individuals. Often those few may be only tangentially connected with the strike, if they are connected at all. Finally, in many instances, striking employees themselves abhor

and are ashamed of these activities and ought not bear the resulting stigma. On the whole, therefore, we strongly favor the existing law of this circuit.

III.

Even though it did not prove individual responsibility for the violence, the hospital still urges that its refusal to reinstate or rehire the striking workers is justified by what it claims was their heartless act of striking the hospital without notice, thereby placing that institution in a position wherein the lives and health of patients in its care were seriously endangered. In this respect, however, we agree with the administrative law judge that the hospital's claim of surprise at the walkout was substantially overstated. Further, since the hospital does not specifically refute the administrative law judge's findings of fact with respect to those circumstances, we must accept them.

The administrative law judge found that the strike had long been anticipated. On May 31, 1972, the hospital had posted a letter signed by the President of the Board, expressing the hospital's opposition to the representation of its employees by the union and notifying those employees that the hospital was steadfastly refusing to recognize the union. At that time the hospital notified the employees that those "who decline to work will be considered as having resigned from their positions and replacements will be sought . . . . Those participating in [picketing] activities and not working, would necessarily be considered as having withdrawn from their employment with this institution." On June 9, 1972, Hospital Administrator Keene discharged the admissions clerk Arnold D. Coleman for soliciting employees to sign union authorization cards. Earlier on that day Achilles Williams was also discharged for his union activity. It is apparent that the company knew that a strike was brewing for at least several days prior to its actual occurrence and, in fact, rebuffed an eleventh hour

union request to sit down and discuss the issues and thus avoid the strike.

The administrative law judge, while acknowledging that the strike had caused "serious inconvenience," nevertheless also determined that the company had exaggerated the impact of the strike. In particular he found that the intensive care unit remained closed after the strike due to a lack of professional employees, who had not joined in the strike, and not, as stated by company witnesses, because of the strike activity. Since neither the employees nor the company was subject to the jurisdiction of the Board under the Act at the time the strike commenced, the notice and waiting period was not applicable. Research has failed to disclose any duty under Kentucky law that would require notice or a waiting period before striking. Under these circumstances we are unwilling to disturb the administrative law judge's findings that the walkout itself was not such misconduct as would disqualify any striker for reinstatement or new employment. In summary, therefore, neither the walkout nor the conduct of the strikers or the union was sufficient to justify the company's refusal to consider individual striking employees for subsequent reinstatement or employment on a new-hire basis.

IV.

In ordering the hospital to reinstate the strikers to their former positions the administrative law judge held that the strikers were not effectively discharged until they were denied reinstatement in October, 1974, two months after the health care amendments became effective. On its part the hospital vigorously asserts that the strikers were terminated on June 12, 1972, when they initiated the strike. The Board's decision brought the workers within the protection of the Act and was based, in part, upon the administrative law judge's finding that the hospital had failed to personally communicate its attempt to discharge the

strikers prior to October, 1974. Simply put, this finding completely ignores the record.

The Board based its adoption of the administrative law judge's rulings on a construction of a letter dated November 12, 1974, from the union to the hospital as requesting reinstatement and making application for new employment on behalf of all strikers not then employed.[7] Further, it was held that the letter was "clearly and unambiguously a request for new employment on behalf of all strikers" who were "thus entitled to non-discriminatory consideration of their employment applications on and after November 12, 1974, or an earlier date if an individual application was filed."

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[7]The letter stated:

> Since I sent you a letter dated October 7, 1974, many of the former strikers have been to the hospital and made application for employment on the standard application for employment form provided by the hospital. Others have obtained an application for employment form and mailed it to the hospital pursuant to instructions from the hospital's personnel department or the lady occupying the information booth in the lobby of the hospital.
>
> These former strikers desire employment with the hospital in their former jobs and it is my opinion that you are obligated to place them back on their former jobs; however, if you will not place them back on their former jobs at this time because you contend that no vacancies exist the former strikers seek employment to their former jobs or any other jobs, which they are qualified to fill, at any time in the future when vacancies occur on their former jobs or any other jobs.
>
> Each former striker on his or her application for employment has indicated his or her address and the former strikers expect to be employed in the future when job vacancies occur.
>
> The application for employment filed by each former striker is a continuing offer and each individual desires to be employed whether you see fit to employ any other former striker or strikers.

Our review of the administrative law judge's determination that the striking employees had not been terminated prior to the effective date of Board jurisdiction convinces us that this finding was not supported by substantial evidence.

The administrative law judge found that the hospital had not effectively terminated the strikers prior to the effective date of the amendments because it had failed to communicate the fact of discharge to the strikers.[8] Al-

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[8]The administrative law judge stated:

> Hospital Administrator Keene testified that the employees who left their jobs to join the strike were terminated in accordance with the automatic operation of (1) the "Resignations" provision in its "Personnel Policies" booklet, quoted above, and (2) its May 31, 1972, notice to employees that those who participate in a strike will be considered as having resigned from their positions and replacements will be sought to fill their jobs. However, contrary to Respondent, neither communication served to effect the discharge of the striking employees. The provision regarding resignations in the Hospital's "Personnel Policies" booklet by its terms relates only to resignations and has no applicability to strikes and the May 31, 1972, letter was prospective in operation in that it merely advised employees that if they joined a strike replacements would be sought as the Hospital would consider that they had resigned from their jobs. I am acquainted with no case and none have been cited to me that holds that any such notice constitutes an operative discharge of employees. Hospital Administrator, Keene also testified that a "Notice of Termination of Employment" was placed in the personnel folder of each striking employee. However, the effected employees were not advised of this fact nor were they otherwise informed that they had been terminated. In order to terminate an employment relationship there must be not only an intention on the part of the employer to abrogate the employment relationship but also some communication of that intent to the employee. Thus, as the Supreme Court of California pointed out in

(Footnote continued on following page)

though the administrative law judge framed the issue to be whether the employees had been discharged prior to the effective dates of the amendments under Kentucky common law, the decision was supported by federal rather than Kentucky law.[9] Further, the administrative law judge relied upon the holding in *Percival* v. *National Drama Corp.*, 181 Cal. 631, 637, 185 P. 972 (1919), wherein the California Supreme Court determined that "a discharge cannot be effected by a secret, undisclosed intention on the part of the master. It must be done by some word communicated to the servant."

Our disagreement with the administrative law judge in this regard is prompted by our conclusion that if the hospital had a right to discharge the striking employees before

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(Footnote continued from preceding page)

> *Percival* v. *National Drama Corporation,* 181 Cal. 631, 637, 185 P. 972, 974 (1919), "A discharge cannot be effected by a secret, undisclosed intention on the part of the master. It must be done by some word or act communicated to the servant." I find, therefore, the Respondent had not discharged the striking employees prior to the date as of which application for their reinstatement was made. (footnotes omitted)

[9]The administrative law judge ruled upon a series of early decisions under the Wagner Act and rulings of this court in *Shopmen's Local Union No. 733* v. *NLRB,* 219 F. 2d 874 (6th Cir.), *cert. denied,* 350 U. S. 835 (1955), and *NLRB* v. *European Cars Ypsilanti, Inc.,* 324 F. 2d 606 (6th Cir. 1963), where we held as a matter of federal law that the language relied upon by the employer as proof of termination was prospective only and not final. For example, in *Shopmen's Local Union* a company letter informed strikers that if they did not return to work by a certain date "your employment will thereupon be permanently terminated." However, due to the inconsistent act of reinstating all employees who had not been replaced and had sought to return to work after the critical date, we upheld the Board's determination that the letter was ineffective.

the effective date of the amendments, the overwhelming evidence in the record indicates that the employees knew that they were, in fact, terminated. It is true that the hospital did not send individual termination notices to each striking employee. Nevertheless the intent was unmistakably communicated. Prior to the strike the company posted notices that strike activity would result in discharge. Provisions in the employment regulations provided to all employees clearly stated that absence from work without notice was cause for dismissal. Shortly after the strike began a "notice of termination" was placed in each striker's personnel folder terminating employment for failure to give notice. These facts clearly satisfy the qualification in *Percival* that:

> No set form of words is necessary; but any words or acts which show a clear intention on the part of the master to dispense with the servant's services, and which are equivalent to a declaration to the servant that his services will be no longer accepted, are sufficient.

Id. at ——.

Other than to assert it as a naked fact, the Board has not endeavored to support its claim that under Kentucky common law the strikers were not discharged before the amendments became effective. For its part the hospital relies primarily upon *Kentucky Unemployment Ins. Comm.* v. *Murphy,* 539 S. W. 2d 293 (1976). There the Kentucky Supreme Court held that direct personal notice to the employee was not necessary to terminate an employment relationship where the employee had knowingly failed to comply with the requirements of employment.[10] On the

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[10]In *Kentucky Unemployment Ins. Comm.* v. *Murphy,* 539 S. W. 2d 293 (1976), the employer had informed a female em-

(Footnote continued on following page)

basis of *Murphy,* we conclude that, faced with the circumstances here, the Kentucky courts would find that the strikers had voluntarily terminated their own employment by failing to comply with hospital regulations upon notification of the threatened consequences, and that under Kentucky law the striking employees were terminated prior to the effective date of the amendments.

Alternatively, the Board urges that irrespective of Kentucky law, the hospital was bound to treat the striking workers as employees within the meaning of Section 2(3) of the Act, 29 U.S.C. § 153(3), since their protected status as employees demanded that they be reinstated to their former positions upon cessation of the strike. This argument is based upon the administrative law judge's ruling that even if the hospital had given adequate notice of termination to the strikers, their rights to reinstatement would not be affected since the termination would occur as a result of, or in connection with, a current labor dispute. The administrative law judge reasoned that since a recognition strike was in progress at the time the Board assumed jurisdiction over labor disputes involving non-profit health care institutions, the strikers remained employees under Section 2(3) of the Act and were entitled to reinstatement notwithstanding any actual effort by the company to replace them.

This precise argument was decided under analogous circumstances in *Woodlawn Hospital* v. *NLRB,* 596 F. 2d

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(Footnote continued from preceding page)

ployee who had appeared for work in a pantsuit, "not to come back to work wearing a pantsuit." The employee, however, quit work rather than comply with the employer's mandate. Thereafter, she applied for Workmen's Compensation on the basis that she had been discharged. In reversing an award for the employee, the Kentucky Supreme Court observed that, "the requirement that she not wear a pantsuit was her only barrier between employment and unemployment; the choice was solely hers."

1330 (7th Cir. 1979). In an exhaustive treatment of the issue, the Seventh Circuit concluded that an employee who had been effectively discharged by a hospital employer for striking prior to the effective date of the amendments did not acquire "employee" status once the amendments became applicable to the employer. The court reasoned that before the amendments, Congress had permitted health care employees to exercise traditional common law prerogatives over the employment relationship. It expressly rejected case authority relied upon by the Board to the effect that the Wagner Act applied to employees fired prior to its effective date. *Id.* at 1337. After reviewing the *Woodlawn Hospital* decision, we have nothing to add to the careful treatment given this subject by the Seventh Circuit. Therefore, contrary to the Board's position, those striking employees who were discharged before the effective date of the amendments were not entitled to reinstatement to either their former or substantially equivalent positions, nor were they entitled to any seniority or other rights or privileges which would otherwise have attached by reason of that prior employment, including lost earnings.

V.

Finally, there remains the Board's determination that the hospital was guilty of discrimination by refusing to hire the former employees because of their concerted union activity after the date of the health care amendments.

The Board's finding that the hospital categorically refused to accept any application for employment from any of the former striking employees after the effective date of the amendments is supported by substantial evidence upon the record as a whole in this case. The facts here clearly place the case within the principle of *Phelps-Dodge Corp.* v. *NLRB,* 313 U. S. 177 (1941), wherein it was held that it is unlawful discrimination under the Act to refuse to hire applicants for employment because of protected union ac-

tivity.[11] The record before us shows that the company hired hundreds of employees after the effective date of the amendments while at the same time refusing to consider any striker as an applicant for new employment. As we have already noted, the hospital has specifically declined to charge any individual striker with specific acts of misconduct which might otherwise justify its refusal to hire that striker, and participation in the strike alone would not provide a legitimate reason for refusing to consider the application. It therefore appears that the Board's finding is supported by substantial evidence and that the employer's refusal to hire the strikers as new employees violates Section 8(a)(1) and (3) of the Act.

VI.

In summary, we conclude that the striking employees were not required to comply with the 10-day notice requirement of Section 8(g) of the Act since the strike was already in progress on the effective date of the health care amendments, and that absent proof of specific individual misconduct the company may not deprive a protected employee of any rights he might possess under the Act. However, we also conclude that under Kentucky common law, the striking employees were effectively terminated prior to the effective date of the amendments and therefore did not

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[11]Once more we repair to *Woodlawn* v. *NLRB*, 596 F. 2d 1330 (7th Cir. 1970). While the Seventh Circuit reached a different result upon the facts there, *Woodlawn* recognized that where the company's refusal to hire was based upon the applicant's union status, a violation of the Act would be found:

> We emphasize that this result does not leave Woodlawn free to discriminate against the discharged strikers on the basis of their union activity. Woodlawn would violate the Act by refusing to hire the former employees on discriminatory grounds related to concerted employee activity.

Id. at 1337.

acquire "employee" status under the Act merely because the strike was in progress on the effective date. Therefore, although the striking employees were not entitled to reinstatement as returning employees, with the right of restoration of seniority and other rights and privileges arising from the former relationship, substantial evidence upon the record as a whole supports the Board's finding that the hospital discriminated against those striking employees who had made application for new employment with the hospital after the effective date of the amendments.

Accordingly, enforcement of those portions of the Board's order not consistent with this opinion are denied. The order under review as upheld will be enforced.

No costs, neither side having prevailed in full.

Order of the United States Court of Appeals for the Sixth Circuit which was entered on April 23, 1980

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 77-1057

METHODIST HOSPITAL OF KENTUCKY, INC., - *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, - - *Respondent,*
COMMUNICATION WORKERS OF AMERICA, INC., AFL-CIO, - - - - - - - *Intervenor*

BEFORE: EDWARDS, Chief Judge, ENGEL and MERRITT, Circuit Judges

ORDER—Filed April 23, 1980

By inadvertent error a paragraph was deleted in the printing process from the slip opinion filed in this case on March 20, 1980.

Accordingly, it is ORDERED page 9 of the slip opinion be amended by inserting the full paragraph appearing below:

". . . this finding completely ignores the record.

"The administrative law judge also ruled that even if the hospital had given adequate notice of termination to the strikers, their rights to reinstatement would not be affected because they would occur as a result of, or in connection with, a current labor dispute. It was his logic that since a recognition strike was in progress at the time the Board assumed jurisdiction over labor disputes involving nonprofit health care institutions, the strikers remained employees under Section 2(3) of the Act and were entitled to

reinstatement notwithstanding any actual effort to replace them by the company.

"The Board bases its adoption . . .."

Entered by Order of the Court
/s/ John P. Hehman, Clerk

APPENDIX B

Decision of the National Labor Relations Board, which is reported at 221 NLRB 692 (1975).

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

Methodist Hospital of Kentucky, Inc. and Communications Workers of America, AFL-CIO	Case 9-CA-8939

DECISION AND ORDER

On August 29, 1975, Administrative Law Judge Herbert Silberman issued the attached Decision in this proceeding in which he granted the Respondent's motion to dismiss the complaint in its entirety. Thereafter, in accordance with Section 102.27 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the General Counsel and the Charging Party filed timely requests for review of the Administratve Law Judge's recommended Order of dismissal and briefs in support thereof, and the Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the requests for review and briefs and has decided to reverse the Administrative Law Judge's recommended Order dismissing the complaint herein.

The facts of this case are not in substantial dispute. The Respondent, Methodist Hospital of Kentucky, Inc., is a nonprofit Kentucky corporation engaged in the operation of a hospital in Pikeville, Kentucky. On June 10, 1972, the employees of the hospital commenced a strike against the hospital. Shortly thereafter, the strike was ratified by the Charging Party, Communications Workers of America, AFL-CIO. The strike continued until October 1974.[1] On October 7, the Charging Party sent a letter to the Respondent. This letter, a copy of which was sent to the Federal Mediation and Conciliation Service, stated that the Charging Party was terminating the strike and picketing connected therewith, effective October 10. This letter also contained an unconditional offer on behalf of all the striking employees to return to work. At the hearing, the parties stipulated that this letter was the only notice given by the Charging Party to the Federal Mediation and Conciliation Service concerning the strike and picketing since July 26.[2] On October 12, the Charging Party sent another letter to the Respondent. This letter renewed the unconditional offer to return to work and also informed the Respondent that the striking employees were applying for employment with the Respondent as new applicants.

The complaint, as amended at hearing, alleged, in substance, that the Respondent had violated the Act by refusing after October 7 to reinstate the striking employees or hire the striking employees as applicants for new employment. During the course of the hearing, and prior to the completion of the General Counsel's case in chief, the Respondent made a motion to dismiss the complaint on the ground that the Charging Party had failed to comply with

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[1]All dates herein are in 1974 unless otherwise indicated.

[2]The nonprofit hospital amendments to the Act were signed into law by the President on July 26, 1974, and became effective on August 25, 1974.

the notice requirements of Section 8(g) of the Act.[3] and therefore it was relieved of any obligation to reinstate the striking employees or to hire them as applicants for new employment. The General Counsel resisted the motion arguing, *inter alia,* that the notice requirements of Section 8(g) did not apply to the facts of this case since the strike had begun many months prior to the effective date of the hospital amendments. The Administrative Law Judge granted the motion, relying on certain guidelines set forth by the General Counsel in a memorandum entitled "Guidelines for Handling Unfair Labor Practice Cases Arising Under the 1974 Nonprofit Hospital Amendments to the Act," dated August 20. The pertinent portion of the guidelines provides, in substance, that, after the effective date of the hospital amendments, a labor organization engaged in ongoing strikes, picketing, or other concerted refusals to work will be required to cease such ongoing activities, serve the appropriate notices, and wait the full statutory period required before resuming such activities. We do not agree.

In our view, nothing in Section 8(g) or in the applicable legislative history requires the result reached by the Administrative Law Judge herein. On the contrary, it is apparent from the plain language of Section 8(g) that the 10-day notice requirement provided for therein is not applicable where the strike or other activity began prior to the effective date of the hospital amendments.[4] Thus, Section

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[3]In pertinent part, Sec. 8(g) provides:

> A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention . . . .

[4]*United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 630, AFL-CIO (Lein-Steenberg),* 219 NLRB No. 153 (1975), cited by the Respondent, is inapposite since there the strike commenced after the effective date of the hospital amendments.

8(g) specifically provides that a labor organization must give the applicable 10-day notice "*before* engaging in any strike, picketing, or other concerted refusal to work" (emphasis supplied). Clearly, the use of the word "before" can fairly be read only as contemplating activity commencing after the effective date of the hospital amendments. This plain reading of the statute is consistent with the stated legislative purpose behind the 10-day notice requirement provided for in Section 8(g), i.e., "to give health care institutions sufficient advance notice of a strike or picketing to permit them to make arrangements for the continuity of patient care."[5] Thus, where, as here, the strike or other activity began prior to the effective date of the hospital amendments, the health care institution is already possessed of actual notice and continuity of patient care cannot be further provided for by requiring additional notice. The case of *Grand Lodge of Free and Accepted Masons, Masonic Home,* 220 NLRB No. 206 (1975), is apposite here. In *Grand Lodge,* the union went on strike against a nonprofit nursing home prior to the Board's assertion of jurisdiction over nonprofit nursing homes. The strike continued after the Board had asserted jurisdiction and the union did not thereafter comply with the notice requirements of Section 8(d)(3). The Board concluded that since the strike was legal when commenced, the union was not thereafter required to comply with the notice requirements of Section 8(d)(3). Accordingly, as we have determined that the Charging Party was not required to comply with the notice

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[5]S. Rept. 93—766, 93d Cong., 2d Sess. 4 (1974); H. Rept. 93—1051, 93d Cong., 2d Sess. 5 (1974); see also the remarks of Senator Taft in 120 Cong. Rec., July 10, 1974, at S.12108; of Senator Cranston in 120 Cong. Rec., May 2, 1974, at S. 6932; of Senator Williams in 120 Cong. Rec., May 2, 1974, at S. 6934; and of Representative Ashrook in 120 Cong. Rec., May 30, 1974, at H. 4589.

requirements of Section 8(g), we shall order the record to be reopened and the proceeding remanded for further hearing before the Administrative Law Judge and for the preparation of a Decision.

ORDER

It is hereby ordered that the record in this proceeding be, and it hereby is, reopened and that a further hearing be held before Administrative Law Judge Herbert Silberman to take testimony and receive evidence from the General Counsel, the Charging Party, and the Respondent.

IT IS ALSO ORDERED that this proceeding be remanded to the Regional Director for Region 9 for the purpose of arranging such further hearing, and that said Regional Director be, and he hereby is, authorized to issue notice thereof.

IT IS FURTHER ORDERED that upon conclusion of such further hearing, the Administrative Law Judge shall prepare and serve on the parties a Decision containing findings of facts upon the evidence received pursuant to this Order, and such conclusions of law and recommendations that he may deem appropriate; and that, following the service of such Decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, shall be applicable.

Dated, Washington, D.C., November 14, 1975.

John H. Fanning, Member
Howard Jenkins, Jr., Member
John A. Penello, Member

(Seal) National Labor Relations Board

Supplemental Decision of the National Labor Relations Board, which is reported at 227 NLRB 1392 (1977).

SUPPLEMENTAL DECISION AND ORDER

On June 23, 1976, Administrative Law Judge Herbert Silberman issued the attached Decision[1] in this proceeding. Thereafter, Respondent filed exceptions[2] and a supporting brief, the General Counsel and Charging Party filed limited exceptions and briefs, and Respondent filed an answering brief to their exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record[3] and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the

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[1]The Administrative Law Judge made two inadvertent errors in his Decision in quoting from Keene's testimony near the end of part III, B, of his Decision. Thus, in the first sentence quoted, the word "would" does not appear in the transcript, and in the second quoted sentence the word "this" appears in the transcript instead of the word "these."

[2]Respondent has excepted to the Administrative Law Judge's failure to permit evidence as to the causes and effects of the violence and disruption caused by the strike. Although we find that the evidence was admissible, we find no prejudice because none of it establishes such misconduct by the Union or individual strikers involved herein.

[3]The Administrative Law Judge prior to completion of the General Counsel's case had granted Respondent's motions to dismiss the complaint on the grounds that the Charging Party had failed to comply with the notice requirements of Sec. 8(g) of the Act. The Board in *Methodist Hospital of Kentucky, Inc.*, 221 NLRB 692 (1975), reversed the Administrative Law Judge and reopened the proceeding for further hearing.

Administrative Law Judge and to adopt his recommended Order, as amplified herein.

The facts of this case are not in substantial dispute and are set out fully by the Administrative Law Judge. Briefly, the Respondent, Methodist Hospital of Kentucky, Inc., is a nonprofit Kentucky corporation engaged in the operation of a hospital in Pikeville, Kentucky. The hospital was exempt from the Act prior to August 25, 1974, by virtue of the exclusion of nonprofit hospitals from the definition of an "employer" in Section 2(2) of the Act, but became an employer within the meaning of Section 2(2) as a "health care institution" as defined in Section 214 on August 25, 1974, the effective date of the health care amendment.

The strike began on June 10, 1972, when approximately 200 nonprofessional employees walked off their jobs, and shortly thereafter it was ratified by the Charging Party, Communications Workers of America, AFL-CIO. The strike continued until October 10, 1974, when the Union by letter dated October 7 called off the strike and made an unconditional application for reinstatement on behalf of all strikers. Subsequent to the termination of the strike approximately 81 individual strikers filed separate applications at the hospital for employment as new employees. The Union on November 12, 1974, sent another letter to Respondent not only requesting reinstatement but making application for new employment on behalf of all strikers.

The Administrative Law Judge found, and we agree for the reasons fully set forth by him, that Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate the striking employees when vacancies arose on or about October 10, 1974. We therefore adopt his recommended Order requiring immediate and full reinstatement of the strikers to their former positions or, if those jobs no longer exist, to substantially equivalent positions without prejudice, and backpay for loss of earnings. We shall direct, in

addition, that the Respondent discharge, if necessary to accomplish such reinstatement, all employees hired since October 10, 1974, the date of such application for reinstatement.

Furthermore, we find merit in the General Counsel's and Charging Party's exceptions to the Administrative Law Judge's failure to find independent violations of Section 8(a)(3) and (1) by Respondent's refusal to hire as new employees any of the strikers named in Appendix E of the Order because they engaged in union and/or protected concerted activity.[4] The Union's November 12, 1974, letter was clearly and unambiguously a request for new employment on behalf of all strikers.[5] The strikers were thus entitled to nondiscriminatory consideration of their employment applications on and after November 12, 1974, or an earlier date if an individual application was filed.

It is hornbook law that it is violative of Section 8(a)(3) for an employer to discriminate against union members in hiring new employees.[6] And it is conceded that the Respondent decided not to rehire any employees who had walked off their jobs, and it is a fact that not one single striker has been hired subsequent to the request. It is thus clearly established that the hospital refused employment because of prior concerted activities by the applicants and thus had an unlawful and discriminatory motive in refusing to hire the former strikers as new employees.

The Administrative Law Judge found the essential facts of the violations but failed, possibly as an oversight, to include findings of fact or conclusions of law on this con-

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[4] *Ashville-Whitney Nursing Home,* 188 NLRB 235 (1971), remanded 468 F. 2d 459 (C.A. 5, 1972), affd. 208 NLRB 341 (1974); *Jackson Chair Co., Inc.,* 176 NLRB 239 (1969); *Universal Mobile Homes,* 210 NLRB 689 (1974).

[5] See *Methodist Hospital of Kentucky, supra.*

[6] *Phelps Dodge Corporation* v. *N.L.R.B.,* 313 U. S. 177 (1941).

duct as an independent violation of the Act. Thus, in footnote 14 of his Decision he states:

> However phrased, the meaning of Keene's testimony is that the Hospital refused to reinstate the employees who joined the strike because of their participation in that concerted activity. Likewise, it is Keene's testimony that after March 7, 1973, the Hospital *refused to rehire* (as distinguished from reinstate) any of the striking employees for the same reason. [Emphasis supplied.]

Accordingly, we find that Respondent additionally discriminated against the former strikers in violation of Section 8(a)(1) and (3) of the Act by refusing to hire them as new employees because of their membership in, sympathies for, and activities on behalf of the Union and/or because of the protected concerted activities in having participated in a strike.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Methodist Hospital of Kentucky, Inc., Pikeville, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(a):

"(a) Discouraging membership in Communications Workers of America, AFL-CIO, or any other labor organization, by failing to reinstate or to reemploy employees who have engaged in a lawful strike and have made unconditional applications for reinstatement or reemployment to vacant positions as they occur, without prejudice to their

seniority and other rights and privileges, or by otherwise discriminating against any of its employees in regard to their hire, tenure of employment, or other terms or conditions of their employment."

2. Substitute the following for paragraph 2(a):

"(a) Offer to those employees listed in Appendix E attached hereto immediate and full reinstatement to their former positions or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discriminatory failure to reinstate or to reemploy them in the manner set forth in the section of the Administrative Law Judge's Decision entitled 'The Remedy,' as modified by the Board's Decision."

3. Substitute the attached notice marked "Appendix F" for that of the Administrative Law Judge.

Date, Washington, D.C. January 24, 1977

Betty Southard Murphy, Chairman
John H. Fanning, Member
John A. Penello, Member
(Seal) National Labor Relations Board

Decision of the N.L.R.B. Administrative Law Judge, which is reported at 221 NLRB 692 (1975)

DECISION

Statement of the Case

HERBERT SILBERMAN, Administrative Law Judge: Upon a charge filed on November 11, 1974, by Communications Workers of America, AFL-CIO, herein called the Union, a complaint was issued on June 18, 1975, alleging that the Respondent, Methodist Hospital of Kentucky, Inc., herein called the Hospital, has engaged in unfair labor

practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended. Respondent filed an answer generally denying that it has engaged in the unfair labor practices alleged in the complaint and asserting various affirmative defenses. A hearing in this proceeding was held in Pikeville, Kentucky, on August 27 and 28, 1975.

Upon the entire record in this proceeding, I make the following:

Findings of Fact

I. Jurisdiction

Methodist Hospital of Kentucky, Inc., a nonprofit Kentucky corporation, is engaged in the operation of a health care institution in Pikeville, Kentucky. During the 12 months preceding the issuance of the complaint, which period fairly represents the Hospital's operations, Respondent purchased goods and products valued in excess of $50,000 which were shipped to its premises through channels of interstate commerce directly from points located outside the State of Kentucky. During the same period the Hospital's gross revenues exceeded $250,000. Respondent admits, and I find, that the Hospital is an employer within the meaning of Section 2(2) and (14) engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

The complaint as amended at the hearing, in substance, alleges that employees of the Hospital were engaged in a strike against the Hospital during the period from June 10, 1972 until October 7, 1974. On October 7, 1974, the striking

employees referred to in paragraph 7 of the complaint made an unconditional offer to return to work. On the same day and also on November 12, 1974, the striking employees also made applications for employment with the Hospital as new employees. The Hospital has refused to reinstate the striking employees and also has refused to hire the striking employees as applicants for new employment although since October 7, 1974, the Hospital has hired many new employees.

Uncontroverted evidence was adduced at the hearing that prior to August 25, 1974, the effective date of the nonprofit hospital amendments to the Act (Public Law 93-360), the Hospital was opposed to the representation of its employees by a labor organization. On the second day of the hearing in this proceeding, as of which time General Counsel had not yet finished presenting his case-in-chief, the Hospital made a motion to dismiss the complaint on the ground that the Union has failed to comply with Section 8(g) of the Act and therefore the Hospital was relieved of all obligation to reinstate the striking employees or to rehire the striking employees as applicants for new employment. Respondent's motion was argued at length on the record. All parties agreed on the record that all evidence bearing upon the motion had been adduced at the hearing. I concur with the position set forth in the Memorandum of the General Counsel of the National Labor Relations Board, dated August 20, 1974, entitled "Guidelines Under Hospital Amendments" and find that the Union has failed to comply with the strictures of Section 8(g). Accordingly, I grant the motion to dismiss the complaint in this proceeding.

Conclusions of Law

Respondent has not engaged in the violations of the Act alleged in the complaint.

Upon the basis of the foregoing findings of fact, conclusion of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[1]

The complaint is dimissed in its entirety.

Dated at Washington, D.C.

(s) Herbert Silberman
Administrative Law Judge

Decision of the N.L.R.B. Administrative Law Judge, which is reported at 227 NLRB 1392 (1977)

DECISION

Statement of the Case

HERBERT SILBERMAN, Administrative Law Judge: Upon a charge filed on November 11, 1974, by Communications Workers of America, AFL-CIO, herein called the Union, a complaint was issued on June 18, 1975, alleging that the Respondent, Methodist Hospital of Kentucky, Inc., herein called the Hospital, has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended. Respondent filed an answer generally denying that it has engaged in the unfair labor practices alleged in the complaint and asserting various affirmative defenses. A hearing in this proceeding was held in Pikeville, Kentucky, on August 27 and 28, 1975, and March 9 and 10, 1976. Following the close

[1]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order and all objections thereto shall be deemed waived for all purposes.

of the hearing, the parties filed briefs with the Administrative Law Judge.

Upon the entire record in this proceeding, I make the following:

Findings of Fact

I. Jurisdiction

Methodist Hospital of Kentucky, Inc., a nonprofit Kentucky corporation, is engaged in the operation of a health care institution in Pikeville, Kentucky. During the 12 months preceding the issuance of the complaint, which period fairly represents the Hospital's operations, Respondent purchased goods and products valued in excess of $50,000 which were shipped to its premises through channels of interstate commerce directly from points located outside the State of Kentucky. During the same period the Hospital's gross revenues exceeded $250,000. Respondent admits, and I find, that the Hospital is an employer within the meaning of Section 2(2) and (14) engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Issues*

The complaint as amended at the hearing, in substance, alleges that employees of the Hospital were engaged in a strike against the Hospital during the period from June 10, 1972, until October 10, 1974. As of October 10, 1974, the striking employees referred to in paragraph 7 of the complaint made an unconditional offer to return to work. The striking employees also made applications for employment with the Hospital as new employees. The Hospital has refused to reinstate the striking employees and also has

refused to hire the striking employees as applicants for new employment although since October 10, 1974, the Hospital has hired many new employees.

In addition to denying generally that it has engaged in the alleged unfair labor practices, Respondent interposes seven affirmative defenses. I find no merit to these defenses. Below is a summary of the alleged affirmative defenses and my reasons for rejecting each.

First defense: Following the inception of the strike Respondent "promptly offered reinstatement to all such employees who participated in said work stoppage and has employed and continues to employ employees who participated in that work stoppage without any discrimination whatsoever because of such participation or because of any union activities or sympathies of any of its employees."

There is no evidence that the Hospital offered reinstatement to any striker,[1] although between the commencement of the strike and March 7, 1973, the Hospital reemployed 37 of the more than 200 employees who had gone on strike and refused to reemploy 6 other strikers who sought to return to work in that period. After March 7, 1973, the Hospital refused to consider any striking employee for further employment.

Second Defense: Prior to August 25, 1974, the effective date of the nonprofit hospital amendments to the Act (Pub-

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[1]On December 21, 1972, the Hospital placed an advertisement of an institutional nature in the Pike County News presumably to enlist community support for its position with respect to the strike. At the bottom of the advertisement is the statement, "Former Employees Of The Hospital Will Be Considered On A Selective Basis For Re-Employment Since A Few Job Vacancies Still Exist." In the text of the advertisement is stated, ". . . that patient care is the sole purpose and responsibility of the Hospital and Union recognition is not consistent with this purpose. The Board [of Directors of the Hospital] has reiterated its position on several occasions and continues to endorse the same stand."

lic Law 93-360), the Hospital permanently replaced the striking employees. "Consequently, and as a result thereof, the said work stoppage was not privileged or protected by the Act and the persons mentioned in paragraph 7 of the complaint were never 'employees' of Respondent on and after June 10, 1972, within the meaning of Sections 2(3), 7, and 8(a)(1) and (3) of the Act, as amended. . . ."

The thrust of this allegation is that the status of the employees who joined the strike should be determined not as of the time they applied for reinstatement, but as of some period prior to the effective date of the nonprofit hospital amendments to the Act. The rationale is that otherwise the amendments to the Act are being retroactively applied. As will be discussed at greater length below I find no merit to this position. The complaint herein is based upon Respondent's conduct after the effective date of the nonprofit hospital amendments, namely, its refusals to honor applications for reinstatement or for employment made subsequent to August 25, 1974. As of the time of such refusals a lawful strike was in progress. *Methodist Hospital of Kentucky, Inc.*, 221 NLRB No. 87 (1975). The participants in the strike who are named in paragraph 7 of the complaint[2] were then employees of the Hospital within the meaning of Section 2(3) "whose work has ceased as a consequence of, or in connection with, any current labor dispute" because they had been employed by the Hospital prior to June 10, 1972, they had joined the strike and they had not thereafter obtained other regular and substantially equivalent employment. Whether permanent replacements had at any time been hired to fill their positions does not affect their status as employees, although it may affect their rights to reinstatement.[3] That right is determined as of the time

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[2]Except Arnold D. Coleman and Achilles Williams.

[3]See *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333 (1938); *Little Rock Airmotive, Inc.* v. *N.L.R.B.*, 455 F. 2d 163 (C.A. 8, 1972).

the applications for reinstatement were made, which was October 10, 1974. As of that date and continuing to the present the striking employees' rights to reinstatement are resolved in accordance with the principles enunciated in *The Laidlaw Corporation,* 171 NLRB 1366 (1968), enfd. 414 F. 2d 99 (C.A. 7 1969), cert. denied 397 U. S. 920 (1970).

Third Defense: The allegations hereof relate to Section 8(g) of the Act and have been disposed of by the earlier decision in this case reported at 221 NLRB No. 87 (1975).

Fourth defense: Misconduct during the strike disqualifies the strikers for reinstatement.

As will be discussed below Respondent has not proved the allegations of this defense.

Fifth defense: Respondent "in good faith and for legitimate and substantial business reasons" has refused to reinstate or reemploy the striking employees.

The only reason advanced in support of this defense is that the current employees of the Hospital resent the strikers and chaotic conditions would result if both groups worked together. However, the evidence adduced by Respondent fails to prove such assertion. Furthermore, even if proved, such reason is not an acceptable ground for refusing to reinstate the striking employees.[4]

Sixth defense: The complaint unconstitutionally seeks to give retroactive effect to the Act.

This is a variation of the second affirmative defense and for the reasons stated in that connection I find no merit to this defense.

Seventh defense: By reason of a decision issued prior to August 25, 1975, by the United States District Court for the Eastern District of Kentucky, and affirmed by the Court of Appeals for the Sixth Circuit,[5] "the entire matter is

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[4]See *N.L.R.B.* v. *Erie Resistor Corp., et al.,* 373 U. S. 221, 229, fn. 8 (1963).

[5]*Communications Workers of America, Local 10317, et al.* v. *Methodist Hospital of Kentucky, Inc.,* 368 F. Supp. 564 (1974), affd. 511 F. 2d 1403 (1975).

res adjudicata, and may not be relitigated in this unfair labor practice proceeding."

Contrary to Respondent, all that was decided by the district court is that it had no jurisdiction, "that the right of private employment is a state, not a federal matter" and "discriminations between private persons do not offend the Federal Constitution and afford no basis for the remedies available under the civil rights statutes."

B. *Sequence of Events*

On December 3, 1971, the Union wrote to Lee D. Keene, administrator of the Hospital, advising that it represents more than 90 percent of the employees of the Hospital and requesting a meeting for the purpose of discussing wages, hours, and working conditions of the employees. The Hospital answered by a letter dated December 17, 1971, informing the Union that

> Patient care is the sole responsibility and purpose of the Methodist Hospital. We are now completing a new building program to serve the health needs of Eastern Kentuckians. The Board of Directors have always had a goal to do their best for our patients and our employees and this will continue to be their policy to the best of our ability.
>
> It is the position of the Board that union representation is not consistent with the purposes of the institution.

The Union on April 8, 1972, filed a representation petition with the Board which was dismissed on May 9, 1972, on grounds of jurisdiction.

On May 31, 1972, the Hospital posted on its bulletin boards and mailed to its employees a letter signed by the president of the board of directors in which he expresses the Hospital's opposition to the representation of its em-

ployees by the Union. Among other things, the letter states:

> The Hospital has steadfastly refused [to recognize the Union and withhold union dues from employees' pay], and will continue to do so because the Board does not feel that a union is to the best interest of you, the employees. The union cannot get you more money; the union cannot improve your working conditions, but it can get dues and initiation fees from you.
>
> * * * * * * * *
>
> The union would not be recognized by the hospital management as the management and the Board does not feel that outside spokesmen are necessary for the employees.
>
> * * * * * * * *
>
> Those employees who decline to work [in the event of a strike] will be considered as having resigned from their positions and replacements will be sought.
>
> * * * * * * * *
>
> Those participating in [picketing] activity and not working, would necessarily be considered as having withdrawn from their employment with this institution.
>
> * * * * * * * *
>
> As union pressures are an extraordinary means of expression, the response to such means of expression will likewise be of similar nature.

Prior to June 10, 1972, when employees of the Hospital went on strike, the Respondent posted on its premises and distributed to its employees the following notice:

> *Don't be misled!*
>
> A strike can cost you:
>
> 1. Your job!

2. Your seniority!
3. Your paycheck!

The union will not hire you—or pay you—
Don't hurt your *future.*

On June 9, 1972, Hospital Administrator Keene discharged the admissions clerk, Arnold D. Coleman, who had been active in soliciting employees to sign union authorization cards, for the asserted reason that he "had been involved in some extracurricular activities."[6] Either on June 8 or on June 9, 1972, Achilles Williams, who had been employed as an orderly in the nursing department, was discharged by Hospital Administrator Keene who told him, "You have been involved in a movement here for sometime. . . . The hospital won't tolerate this. . . . As of now, you are fired."[7]

On June 9, 1972, Imogene Vickers, the Hospital's chief dietician, at a meeting of employees who worked under her supervision, informed them that Coleman and Williams had been discharged because of their union activities, that others would be discharged, and that if any employee in the department signed a union card she too would be fired. Vickers also told the employees that if there should be a strike anyone who did not cross the picket line and report for work would be fired. Also, on the same day Norma Charles, the head housekeeper, held a meeting of her department and informed those who attended that two employees had been discharged for being involved in the Union, that there would be no union at the Hospital, and if there should be a strike anyone who did not cross the picket line would be fired.

A strike by the hospital employees, which was ratified by the Union, began at 10 p.m. on June 10, 1972, and ended

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[6]Coleman's testimony to this effect was not contradicted.

[7]Keene did not contradict the testimony of Achilles Williams in this respect.

at 8 a.m. on October 10, 1974. The strike was supported by approximately 200 employees who left their jobs and picketing was continuous during the entire period of the strike.

Although for some days preceding the strike hospital management had heard rumors that a strike might be called, the only direct communications the Hospital received from the Union in that regard were (1) a letter dated June 9, 1972, advising that on June 7 more than 90 percent of the employees who had signed cards for the Union had voted by secret ballot to call a strike and urging the board of directors of the Hospital to meet with the Union for the purpose of negotiating an agreement for these employees, and (2) a telegram to the administrator of the Hospital, dispatched at 2:57 p.m. on June 10, stating, "We the people that work for you are willing to talk [to] avoid this strike if you will get us word that you are ready to sit down and talk about the problem."

Hospital Administrator Lee Keene testified that everyone who walked off the job was terminated. Keene explained that a longstanding hospital policy requires employees who intend to leave their jobs to give the institution adequate notice and because the strikers failed to give such notice they were discharged. According to Keene, the Hospital's policy regarding such notices is contained in its "Personnel Policies" booklet which, in pertinent part, reads:

> RESIGNATIONS—If circumstances arise whereby you find it necessary to resign your position, you are requested to give at least two weeks written notice to your Department Head. Failure to follow this procedure will forfeit any accrued benefits.

Also, according to Keene, the May 31, 1972, notice warned the employees that replacements will be sought for employees who participate in a strike and they will be considered as having resigned from their jobs. Keene further

testified that as soon after June 10 as it was possible to do so a form labeled "Notice of Termination of Employment" was placed in the personnel folder of each striking employee which in each instance states that the employee had abandoned his position with the Hospital and that the reason for termination was "Failed to return to work; did not give notice." However, the affected employees were not sent copies of the notices of termination nor were they otherwise informed that they had been discharged.

Despite Keene's testimony that the Hospital considered that it had terminated the striking employees when they walked off their jobs, between June 10, 1972, when the strike began, and March 7, 1973, the Hospital reemployed 37 of the striking employees.[8] Keene further testified that on December 21, 1972, the Hospital placed an advertisement in the "Pike County News" advising former employees of the Hospital that they would be considered for reemployment on a selective basis. Keene explained that "[t]he purpose of the ad was [that as] 6 months had elapsed since the strike began . . . we wanted to actually extend one more opportunity to those individuals who walked off their jobs to return to their job if they wished, on a selective basis."

No striking employees were hired by the Hospital after March 7, 1973. On direct examination, Keene testified:

> Well, we had placed the ad in the newspaper and we made our exceptions to the personnel policy for those [strikers who had been reemployed] and, after a given time, approximately 9 months, the decision was made that there would be no more striking employees reemployed or re-hired.
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> * * * * * * * *

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[8]Keene testified that during this period six strikers who applied for reemployment were not hired for reasons which were unrelated to their union activities.

> Well, 9 months had passed since the strike had began and with all of it's problems and then, in the succeeding months, there was a continuation of harassments at the entrance of our institution, abuse our employees were taking, our visitors were taking and . . .
>
> * * * * * * * *
>
> We made a decision, based upon all this kind of abuse, the language and gestures and treatments of our employees and the public, that we just could not, in good conscience return any of the striking employees to the employment of the hospital. So, that decision was made and carried forward.[9]

On cross-examination Keene gave the following explanation for the Hospital's refusal to reemploy any of the strikers after March 7, 1973:

> On the basis of a letter that had been sent to all of our employees on May 31 from the Chairman of the Board advising the employees if they walked off their job, they would be terminated according to hospital policy. That was done.
>
> Exceptions were made . . . to that policy where we reinstated or rehired [37] people over a period of 9 months.
>
> According to the activities that occurred on the picket line beginning June 10, 1972, continuing those 9 months and thereafter, a decision was made "no additional striking employees would be brought back beyond that given point."
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> * * * * * * * *

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[9]Keene testified that the conduct about which he was complaining "was a continuation of very similar activity from the beginning [of the strike] throughout those months" to and including October 10, 1974.

> The hospital took into consideration the fact that approximately 200 people walked off their jobs.
>
> Which is in violation of the personnel policy of the institution.
>
> In addition to that, the decision also included consideration of the violence and abuse that had been directed to the hospital employees over that period of 9 months as well as to the visitors and anyone coming into and leaving the hospital grounds.
>
> * * * * * * * *
>
> The conclusion was that we made exception to the personnel policy of the hospital for 9 months which was considered to be sufficient time for anyone wishing to discuss their job with the hospital; and after that date, we determined there would be no more strikers rehired.

Hospital Administrator Keene and Dorothy Walters Carter, director of nursing, testified that the strike, particularly during its early days, caused the Hospital serious inconvenience which required the Hospital to curtail some patient services. Thus, the intensive care unit was closed, one entire floor was vacated as soon as it was possible to do so, and for a period of time new admissions were limited to emergency cases.[10]

Both Keene and Carter testified that the Hospital, its employees, its patients, and its visitors were subjected to

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[10]Although there is no dispute that the strike had an adverse effect upon the care of patients, nevertheless, both Keene and Carter sought to exaggerate its impact. Thus, although they testified that because of the strike the intensive care unit was closed, Keene elsewhere testified that the reason the intensive care unit remained closed was "[l]ack of professional employees," which classifications did not join the strike, and Carter testified that the intensive care unit has not been reopened because it has been replaced by a critical care unit.

harassment during the strike. According to their testimony, when the strike began on June 10, 1972, a large crowd of people blocked the entrance to the Hospital making it difficult to enter or to leave the premises and abusive epithets were directed at persons going into the Hospital.[11] In addition, there were two other large demonstrations at later dates. Also, they testified that tacks and broken glass regularly were thrown onto the Hospital's driveway, that false fire alarms were sounded, and bomb threats were received. They further testified that it was reported to them that automobiles of nonstriking employees were vandalized by slashing tires, breaking windows, and throwing paint and acid onto the vehicles. Also, on one occasion, a fire was started beneath a trailer on the Hospital's grounds where nurses were residing.

Keene testified that the objectionable conduct continued throughout the entire period of the strike. However, no evidence was adduced to identify any employee of the Hospital who had joined the strike as a participant in any of the described activity nor was any evidence adduced to establish that the Union was responsible for any of the objectionable activity either directly or indirectly by instigating or encouraging such conduct.[12]

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[11]Carter testified that on the first day of the strike and at other times she and other persons were called, "yellow dog, scab, son-of-a-bitch whore, slave driver."

[12]At the hearing counsel for Respondent asserted, "We are not attempting in this case . . . to establish misconduct with respect to any particular individual. This evidence goes towards our defense, that because of the conduct of the pickets, to reinstate these strikers would cause a severe disruption of the hospital . . ." Although the alleged misconduct continued from the beginning of the strike until its end, no explanation was offered by Respondent as to why there would be any more disruption by rehiring strikers after March 7, 1973, than there was during the 9 preceding months when 37 striking employees were rehired.

C. Termination of the Strike

Within 2 months after the nonprofit hospital amendments to the Act became effective on August 25, 1974, the Union terminated the strike against the Hospital. On September 6, 1974, the Union wrote a letter to Lee D. Keene, administrator of the Hospital, calling attention to the amendment of the Act, advising that the Union represented the employees of the Hospital and requesting a meeting to discuss wages, working conditions, other conditions of employment, and settlement of the strike. On October 7, 1974, the Union wrote to the Hospital advising, among other things, that "it is terminating the strike and all picketing in connection therewith effective at 8:00 a.m. on October 10, 1974." The letter also states:

> This letter is also for the purpose of making an unconditional offer by Communications Workers of America on behalf of all strikers to return to work to their former jobs at the hospital effective as of the aforesaid time that the strike is terminated. This unconditional offer to return to work is a continuing offer and each striker individually desires to return to work unconditionally whether you see fit to reinstate any other striker or strikers.

On November 12, 1974, the Union sent the following letter to the Hospital:

> Since I sent you a letter dated October 7, 1974, many of the former strikers have been to the hospital and made application for employment on the standard application for employment form provided by the hospital. Others have obtained an application for employment form and mailed it to the hospital pursuant to instructions from the hospital's personnel department or the lady occupying the information booth in the lobby of the hospital.

> These former strikers desire employment with the hospital in their former jobs and it is my opinion that you are obligated to place them back on their former jobs; however, if you will not place them back on their former jobs at this time because you contend that no vacancies exist the former strikers seek employment to their former jobs or any other jobs, which they are qualified to fill, at any time in the future when vacancies occur on their former jobs or any other jobs.
>
> Each former striker on his or her application for employment has indicated his or her address and the former strikers expect to be employed in the future when job vacancies occur.
>
> The application for employment filed by each former striker is a continuing offer and each individual desires to be employed whether you see fit to employ any other former striker or strikers.

A total of 81 striking employees filed applications for employment with the Hospital. Seventy-eight were filed between October 11 and December 16, 1974, and three were filed between December 20, 1974, and August 20, 1975. On each application is written the initials "LWN," which Hospital Administrator Keene testified stands for "left without notice" and for which reason none of these applicants were given consideration for employment.[13]

Hospital Administrator Keene testified that after the Union's request for reinstatement on behalf of the striking employees was received he consulted with the attorneys for the Hospital and with the board of directors of the Hospital

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[13]Each of the individuals who filed the above-described applications for employment had worked for the Hospital prior to June 10, 1972.

and the decision was reaffirmed not to rehire any of the "individuals that walked off their [jobs]."[14]

Attached hereto as exhibit A is a list of 217 persons who worked for the Hospital on or before June 10, 1972, and who participated in the strike that began on that day.[15] Appendix B attached hereto is a list of 37 striking employees who returned to work between the commencement of the strike on June 10, 1972, and March 7, 1973.

Appendix C attached hereto is a list of 257 persons who were hired by the Hospital between October 14, 1974, and August 12, 1975, and Appendix D attached hereto is a list of 117 persons who were hired by the Hospital between August 12, 1975, and March 9, 1976.

A comparison of the list of the striking employees for whom reinstatement was requested on October 10, 1974, with the list of 374 persons who were hired since that date reveals that had the Hospital not pursued a deliberate and

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[14]Keene testified that the strikers' union activities had no bearing on the Hospital's decision to deny them reinstatement, but "we applied the management practice of the hospital of individuals walking off the job and commonly applied to the personnel policy." However phrased, the meaning of Keene's testimony as that the Hospital refused to reinstate the employees who joined the strike because of their participation in that concerted activity. Likewise, it is Keene's testimony that after March 7, 1973, the Hospital refused to rehire (as distinguished from reinstate) any of the striking employees for the same reason.

[15]Not included in this number are Arnold D. Coleman and Achilles Williams who were discharged before the strike began. The fact that they participated in the strike did not serve to restore their "employee" status "for purposes of asserting the right, as [strikers] to reinstatement." *Acrylic Optics Corporation,* 222 NLRB No. 166 (1976). As no applications for employment on their behalf were introduced in evidence and as there is no other evidence in the case that either had specifically applied for employment with the Hospital after his discharge, I find that General Counsel has not proved any unlawful discrimination against either of them.

conscious policy of refusing to reinstate or to rehire the striking employees it would have had the opportunity to reinstate each and every striking employee.

D. Conclusions

Although the Hospital did not come under the jurisdiction of the Board until August 25, 1974, the strike was not unlawful when it began on June 10, 1972, and the Board has decided that it did not thereafter become unlawful by reason of any failure on the part of the Union to comply with the provisions of the Act after the effective date of the nonprofit hospital amendments.

Hospital Administrator Keene testified that the employees who left their jobs to join the strike were terminated in accordance with the automatic operation of (1) the "Resignations" provision in its "Personnel Policies" booklet, quoted above, and (2) its May 31, 1972, notice to employees that those who participate in a strike will be considered as having resigned from their positions and replacements will be sought to fill their jobs. However, contrary to Respondent, neither communication served to effect the discharge of the striking employees. The provision regarding resignations in the Hospital's "Personnel Policies" booklet by its terms relates only to resignations and has no applicability to strikes and the May 31, 1972, letter was prospective in operation in that it merely advised employees that if they joined a strike replacements would be sought as the Hospital would consider that they had resigned from their jobs. I am acquainted with no case and none have been cited to me that holds that any such notice constitutes an operative discharge of employees.[16] Hospital Administrator Keene also testified that a "Notice of Termination of Employment" was placed in the personnel

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[16]See *Matlock Truck Body & Trailer Corp., and its Agent Roy L. Matlock*, 217 NLRB No. 60 (1975).

folder of each striking employee. However, the affected employees were not advised of this fact nor were they otherwise informed that they had been terminated. In order to terminate an employment relationship there must be not only an intention on the part of the employer to abrogate the employment relationship but also some communication of that intent to the employee.[17] Thus, as the Supreme Court of California pointed out in *Percival* v. *National Drama Corporation,* 181 Cal. 631, 637, 185 P. 972, 974 (1919), "A discharge cannot be effected by a secret, undisclosed intention on the part of the master. It must be done by some word or act communicated to the servant."[18] I find, therefore, that Respondent had not discharged the striking employees prior to the date as of which application for their reinstatement was made. Furthermore, even had the Hospital given the striking employees notice of termination, their purported discharges, for the reasons stated below, would not have affected their rights to reinstatement.

Although the strike began on June 10, 1972, this case does not involve a retroactive application of the Act because the alleged unfair labor practices arise from Respondent's conduct since October 10, 1974, following the date on which the Hospital came under the Board's jurisdiction. Analogous situations arose as of the time the Wagner Act became effective with respect to strikes then in progress. Thus, in *Jeffrey-DeWitt Insulator Co.* v. *N.L.R.B.*, 91 F. 2d 134

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[17] *In re Public Ledger, Inc.*, 63 F. Supp. 1008, 1015 (D.C. Pa., 1945), remanded on other grounds 161 F. 2d 762 (C.A. 3, 1947).

[18] Accord: *Barnett* v. *Joseph Mayer & Bros.*, 119 Wash. 323, 328-329, 205 P. 396, 398 (1922); *Coates* v. *Allegheny Steel Co.*, 234 Pa. 199, 205, 83 A. 77, 79 (1912); *McKinney* v. *Smith*, 271 S. W. 247, 249 (Ct. Civ. App. Tex., 1925); *Ryan* v. *Mayor, City of New York*, 154 N. Y. 328, 48 N. E. 512 (1897). See also *Bob Estes, a Corporation*, 222 NLRB No. 111 (1976); *Matlock Truck Body & Trailer Corp., and its agent Roy L. Matlock, supra.*

(C.A. 4, 1937), cert. denied 302 U. S. 731, where a strike began on June 15, 1935, and the company resumed operations on June 20, 1935, prior to the passage of the Wagner-Connery Labor Relations Act on July 5, 1935, the company argued that the striking employees' failure to return to work automatically terminated their employment and the Act which became effective after the company had resumed operations did not preserve the right of the strikers to be treated as employees. However, the court held:

> Irrespective of the statute . . . the strike did not of itself result in a complete severance of the relationship which had been established between the company and its employees. They were employees on strike because of the labor dispute which existed; and this situation was not materially changed by the resumption of operations on June 20th, even though the company announced that those employees who desired to go to work must go to work on that day. . . .
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> * * * * * * *
>
> It is argued, however, that the act, which was not passed until July 5th, must be given a prospective operation and not be applied to disputes which had their origin prior to its passage. It is a sufficient answer to this that the dispute was current at the time of the passage of the act and that, under the principles of law theretofore recognized, the relationship between the company and its striking employees had not been so completely terminated as to have no further connection with the company's business or the commerce in which it was engaged . . . [91 F. 2d at 138-139.]

In *N.L.R.B.* v. *Carlisle Lumber Co.*, 94 F. 2d 138 (C.A. 9, 1937), cert. denied 304 U. S. 575, which case bears many resemblances to the instant case, a strike began on May 3, 1935. On June 25, 1935, the company posted the following

notice: "We have closed our payrolls which automatically discharges all of our former employees, excepting those now employed." On July 8, 1935, following the passage of the Wagner Act on July 5, 1935, the company advised the union that it had discharged the striking employees. The company contended that the May 3, 1935, strike terminated the relation of employer and employee. Rejecting this argument the court stated, "We believe that in the absence of statute the relationship of employer and employee is not completely terminated by a strike, but that a new status arises. The courts have coined a word to describe the situation and have called an employee on strike a 'striking employee.'" The court also rejected the company's argument that it had discharged all the striking employees on June 25, 1935, prior to the effective date of the Act, that it had the unquestioned common-law right to do so, and therefore that it had no employees when the Act became effective. In that connection the court pointed out, "There is no limitation in the statute that individuals whose work has ceased as a consequence of a current labor dispute are employees only if they were not discharged prior to the effective date of the act. The reading into this statute of such a limitation would constitute an abuse of power."[19] The court further opined: "Thus, the right of discharge claimed by respondent is not absolute. It is subject to the limitations that Congress may prescribe, if it regulates, burdens, or obstructs interstate

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[19]The following language in *Acrylic Optics Corporation*, 222 NLRB No. 166 (1976), is not to the contrary, but applies to a different situation: "The principles governing the reinstatement rights of economic strikers, as enunciated in *N.L.R.B.* v. *Fleetwood Trailer Co., Inc.*, 389 U. S. 375 (1967), are not applicable where, as here, the striker was discharged for cause before the strike ended. Following Respondent's lawful non-discriminatory discharge, Green lost her status as an 'employee' of the Respondent." (Footnote omitted.) Compare: *N.L.R.B.* v. *International Van Lines*, 409 U. S. 48 (1972).

commerce. Therefore, Congress has not destroyed any vested right of respondent, but has merely exercised its right to legislate in respect to a right, over which, because of prior nonaction by Congress, respondent believed it had complete control. Congress took nothing from respondent, for respondent has now as much right as it ever had; that is, the right of discharge, so long as it did not regulate, control, interfere with, burden, or obstruct interstate commerce." In his concurring opinion, Judge Stephens observed, "The gist of respondent's argument is that workmen who were on strike and had been discharged because of striking, prior to the effective date of the Wagner Act, were strangers to respondent, in that there was no warrant in law for considering them at all in the controversy; that to do so was applying the act retroactively. But long before the passage of this act the contest for advantage between capital and labor demonstrated that employees on strike were not strangers to employers."

In like vein is the decision in *Phelps Dodge Corporation* v. *N.L.R.B.*, 113 F. 2d 202 (C.A. 2, 1940), affd. 313 U. S. 177 (1941). There, a strike began on June 10, 1935, and was terminated on August 24, 1935. When the National Labor Relations Act became effective on July 5, 1935, the Company had resumed normal operations with the places of the strikers taken by other employees. From this, the company argued that there was no current labor dispute when the Act became effective on July 5, and consequently its subsequent refusal to reinstate any of the strikers because they were union men was not unlawful since they were not employees within the meaning of the Act. The court held, however, "Though the union had, before the effective date of the Act, apparently been shown to be too weak to win the strike or even to disrupt seriously the working of the mine, we think it clear that a labor dispute still existed which was then 'current' as the Board found." The court explained,

"The definition of employee in the National Labor Relations Act is very broad and should not be narrowed to make abortive the remedial purposes of the statute. It includes 'any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment.' . . . Had the Act been effective when the strike began in June there would, of course, be no question about the retention by the strikers of their status, under the statute, as employees. The sufficiently supported finding of the Board, however, carries the labor dispute into July 5th and that is enough to make the strikers employees within the meaning of the Act when they were refused reinstatement."

A like result was reached by the Court in *Eagle-Picher Mining and Smelting Company, et al.* v. *N.L.R.B.*, 119 F. 2d 903 (C.A. 8, 1941). In that case the company argued that the Board was without authority to require the reinstatement of any of the striking employees because the labor dispute in consequence of which their work had ceased was not current at the time the Board took jurisdiction and the claimants were not then employees within the meaning of the Act. The court rejected the argument, explaining:

> Petitioners' contention that their employees who went out on strike May 8, 1935, and did not return to work were not entitled to be dealt with by the Board as employees because the labor dispute which caused the strike was not current at the time of the Board's hearing, is not tenable in view of *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, in which the Supreme Court said (page 344 of 304 U.S.): "True, there is no evidence that respondent had been guilty of any unfair labor practice prior to the strike, but within the intent of the act there was an existing labor dispute in connection with which the strike was called." And

(page 345 of 304 U.S.): "The strikers remained employees under section 2(3) of the act, 29 U.S.C.A. § 152 (3), which provides: 'The term "employee" shall include . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. . . .' Within this definition the strikers remained employees for the purpose of the act and were protected against the unfair labor practices denounced by it." . . . We have no doubt that those employees of the petitioners who went on strike on May 8 were on July 5, 1935, and thereafter employees of the petitioners for the purposes of the Act.

I am of the view that the principle enunciated in the cases cited above is applicable to the instant proceeding and that the purported discharge of the employees of the Hospital for participating in the strike was ineffective to deny them their rights to reinstatement despite the fact that the Board was not given jurisdiction over the controversy until some 2 years after the strike began. As of the date on which reinstatement of the striking employees was requested, October 10, 1974, the governing considerations had been set forth in *The Laidlaw Corporation* which, in summary, is that the striking employees must be reinstated to the positions that are vacant at the time the applications for reinstatement are made and to the positions that later become vacant. Respondent has failed to do this. The employees referred to in paragraph 7 of the complaint were economic strikers on October 10, 1974, as of which date an unconditional application for reinstatement was made on their behalf. An employer who denies or delays reinstatement has the burden of proving a lawful business justification for his action, which otherwise violates Section 8(a)

(3) and (1) of the Act.[20] Respondent contends that misconduct during the strike provides such justification. However, there is no evidence that the Union was responsible for any such misconduct nor that any of the striking employees had engaged in any of the alleged acts of misconduct. It is well settled that "[e]ach striker's eligibility for reinstatement must be judged solely upon incidents in which the striker in question is alleged to have participated."[21] Respondent in effect also contends that as of October 10, 1974, all striking employees had been permanently replaced. That may be so. However, thereafter several hundred vacancies occurred and Respondent was under an obligation first to offer those jobs to the striking employees who had applied for reinstatement before hiring other employees. Respondent failed to do this. "Proof that jobs were unavailable [on and after October 10, 1974, is] an affirmative defense, and the burden of establishing it rests upon the respondent company."[22]

As the Hospital did not adduce acceptable evidence of business justification for refusing to reinstate the experienced striking employees while hiring new untried employees, its conduct was inherently destructive of employee

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[20]*N.L.R.B.* v. *Fleetwood Trailer Co., Inc.*, 389 U. S. 375, 378 (1967); *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U. S. 26, 34 (1967); *The Laidlaw Corporation, supra.*

[21]*Coronet Casuals, Inc.*, 207 NLRB 304, 305 (1973), Accord: *N.L.R.B.* v. *Wichita Television Corporation, Inc., d/b/a KARD-TV*, 277 F. 2d 579, 585 (C.A. 10, 1960), cert. denied 364 U. S. 871; *N.L.R.B.* v. *Cambria Clay Products Company*, 215 F. 2d 48, 53 (C.A. 6, 1954); *International Ladies' Garment Workers Union, AFL* [*B.V.D. Company*] v. *N.L.R.B.*, 237 F. 2d 545, 550 (C.A. D.C., 1956); *M Restaurants, Incorporated, d/b/a The Mandarin*, 223 NLRB No. 100 (1976).

[22]*N.L.R.B.* v. *Camoria Clay Products Company*, 215 F. 2d 48, 56 (C.A. 6, 1954); *N.L.R.B.* v. *J. G. Boswell Company, et al.*, 136 F. 2d 585, 597 (C.A. 9, 1943).

rights. "This right of reinstatement continued to exist as long as the strikers had not abandoned the employ of Respondent for other substantial and equivalent employment. Moreover, having signified the intent to return by their unconditional application for reinstatement . . . it was incumbent on Respondent to seek them out as positions were vacated. Having failed to fulfill its obligation to reinstate the employees to their jobs as vacancies arose, the Respondent thereby violated Section 8(a)(3) and (1) of the Act."[23] I further find that each of the striking employees referred to in paragraph 7 of the complaint, whose names are listed in Appendix E attached hereto, would have been reinstated to his or her former position or to a substantially equivalent position but for Respondent's unlawful conduct.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

I have found that Respondent violated Section 8(a)(1) and (3) of the Act by failing to reinstate the striking employees when vacancies arose on and after October 10, 1974. As 374 persons have been hired by the Hospital between October 10, 1974, when it first was requested to reinstate

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[23] *The Laidlaw Corporation*, 171 NLRB at 1369.

the striking employees and March 8, 1976, and as the Hospital continues to have a large turnover of employees, I have found that sufficient vacancies occurred since October 10, 1974, to have enabled the Hospital to reinstate all the striking employees referred to in paragraph 7 of the complaint. I will therefore order Respondent to offer the employees listed in Appendix E, attached hereto, immediate and full reinstatement to their former positions or, if those no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and to make them whole for any loss of earnings they may have suffered by reason of Respondent's discriminatory failure to reinstate them by payment to each of a sum of money equal to that which each normally would have earned as wages from the date of Respondent's discriminatory failure to reinstate such individual[24] to the date of Respondent's offer of reinstatement, less the net earnings during such period. The backpay provided for herein shall be computed by calendar quarters in accordance with the method prescribed in *F. W. Woolworth Company,* 90 NLRB 289 (1950). Interest at the rate of 6 percent per annum shall be added to the net backpay and shall be computed in the manner set forth in *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962).

Upon the basis of the foregoing findings of fact, and upon the entire record in this case, I make the following:

Conclusions of Law

1. By failing to reinstate its striking employees as vacancies arose after an unconditional request for their

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[24]The date on which each of the employees listed on Appendix E, attached hereto, would have been reinstated will be determined in connection with the proceedings to ascertain the backpay due to each of them. Factors such as qualification, seniority, past practices on the part of the Hospital, etc., will be taken into account in determining which striker would have been reinstated in each job as it became vacant absent the Hospital's unlawful discrimination.

reinstatement was made on October 10, 1974, thereby discriminating with respect to their hire, tenure of employment, and terms and conditions of their employment and discouraging membership in the Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

2. By reason of the foregoing, Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[25]

Respondent, Methodist Hospital of Kentucky, Inc., Pikeville, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Communications Workers of America, AFL-CIO, or any other labor organization, by failing to reinstate employees who have engaged in a lawful strike and have made unconditional applications for reinstatement to vacate positions as they occur without

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[25]In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

prejudice to their seniority and other rights and privileges, or by otherwise discriminating against any of its employees in regard to their hire, tenure of employment, or other terms or conditions of their employment.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer to those employees listed in Appendix E attached hereto immediate and full reinstatement to their former positions or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discriminatory failure to reinstate them, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(c) Post at its Hospital copies of the attached notice marked "Appendix F."[26] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's representative, shall be posted

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[26]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated at Washington, D.C. June 23, 1976.

(s) Herbert Silberman
Administrative Law Judge

APPENDIX A

INDIVIDUALS WHO WALKED OFF THE JOB ON/ABOUT JUNE 10, 1972

Arlena Adkins	Nursing Aide
Nona Akers	Nursing Aide (CSS)
Lola Anderson	Maid
Roberta Bolton	Aide
Louise Bartley	Clerk/Accounting
Luna Bevins	Maid
Shirley Birchfield	Aide
Alice Blankenship	Kitchen Helper
Ruth Blankenship	Kitchen Helper
Frankie Blair	Watchman
Shirley Brewer	Aide
Eloise Bumgardner	Aide
Ann Burgess	Aide
Opal Burns	Clerk/Accounting
Mary Canada	Aide
Alpha Carroll	Ward Clerk
Minnie Carroll	Kitchen Helper
Shirley Carroll	Kitchen Helper
Irene Charles	Maid
Marilyn Charles	Aide
Hazel Coleman	Aide
Larry Coleman	Orderly
Lola Coleman	Aide
Lois Coleman	Aide
Marie Comer	Aide
Evelyn Compton	Aide
Maxine Courtney	Kitchen Helper
Phyllis Cummins	Aide
Erika Caldwell	Aide
Elwood Charles	Maintenance

Kathryn Chaney	Aide
Joe Dotson	Orderly
Jeanette Elswick	Clerk/Business Office
Anna Mae Fields	Dietary
Nancy Fields	Dietary
Brenda France	Admissions
James Flowers	Orderly
Mae Fleming	Aide
Cora Gibson	Aide
Lue Vicie Gibson	Cook
Phyllis Gibson	Aide
Wilma Reid	Ward Clerk
John Gray	Ward Clerk
Frances Greer	Aide
Jettie Griffey	Aide
Berma Hopkins	Accounting Clerk
Kathleen Howell	Aide
Pearl Howell	Aide
Pat Hamilton	Kitchen Helper
Shirley Harmon	Aide
Betty Hughes	Aide
Louise Huffman	Aide
Patricia Iricks	Business Office
Dorothy James	Aide
Mable James	Aide (CSS)
Mary Ann James	Aide
Johnny Johnson	Orderly
Nine Johnson	Maid
Mary J. Jordan	Aide
Audrey Justice	Aide
Pebble Justice	Aide
Mike Justice	Stores
Sandra Justice	Aide/X-Ray
Anna King	Maid

Peggy King	Kitchen
Glema Kinney	Maid
Ruby Kinney	Cook
Phyllis Layne	Aide
Joe Donald Little	Store Supervisor
Martha Little	Maid
Bernice Mason	Aide
Helen Maynard	Aide
Judy Maynard	Aide
Lonnie Maynard	Orderly
Verda L. Maynard	Maid
Rebecca Maynard	Kitchen Helper
Winfred Maynard	Orderly
Johnny Mattingly	Orderly/O.R.
Eunice McCoy	Cook
Albert Meade	Janitor
Mentie Meade	Kitchen Helper
Tennie Meade	Maid
Roger Meade	Orderly
Beatrice Moore	Ward Clerk
Bethel Mullins	Aide
Mervil Mullins	Cook
Wanda Mullins	Aide
Deborah Mullins	Admissions
Carolyn Justice	Admissions
William Parsons	Watchman
Mona Hamilton	Aide/X-Ray
Judy Hampton	Insurance Clerk
Faye Haynes	Kitchen Helper
Laura Hinkle	Kitchen Helper
Elizabeth Honaker	Housekeeping
Ruby Prather	Aide
Eloise Pyle	Kitchen Helper
Alpha Ratliff	Kitchen Helper

Hazel Ratliff	Kitchen Helper
Josephine Ratliff	Clerk/Typist/M.R.
Rhonda Ratliff	Clerk/Admissions
Velva Ratliff	Aide
Martha Ray	Maid
Arvid Reynolds	Cook
Causby Reynolds	Aide
Mary Ellen Roberts	Aide
Geraldine Robinette	Aide
Peggy Robinette	Aide
Johnny Robinson	Orderly
Virginia Ratliff	Aide
Woody Ratliff	Orderly
Gertrude Robinson	Maid
Lurla Scott	Aide
Nancy Scott	Clerk/M.R.
Hatler Sexton	Janitor
Clemia Smith	Kitchen Helper
Frieda Smith	Aide
Flossie Stanley	Aide
Bobby Tackett	Orderly
Anna Sagraves	Aide
Carrie Stratton	Kitchen Helper
Bertha Taylor	Maid
Bonnie Thacker	Maid
Fayetta Thacker	Aide/C.S.S.
Inis Thompson	Maid
Josephine Thacker	Aide
Elsie Thacker	Aide
Ruth Thacker	Maid
Brenda Thompson	Kitchen Helper
Emoline Thompson	Kitchen Helper
Maudie Thompson	Aide
Shirley Vance	G.P.N.

Eddie Vanover	Janitor
Lola Wallace	Aide
Ardena Wheeler	Aide
Edith Williams	Aide
Janice Wood	Switchboard Opr.
Lorraine Woods	Ward Clerk
Emoline Warrix	Kitchen Helper
Robert Wray	Orderly
Geneva Pauley	Insurance Clerk
Eileen Phillips	Aide
Juanita Phillips	Kitchen Helper
Oler Phillips	Kitchen Helper
Norma Prater	Secretary/X-Ray
Rondle Gene Bowens	Orderly
Danny Coleman	Orderly
Juanita Lewis	Aide
Martha Hall	Kitchen Helper
Betty Weddington	Pharm. Tech.
Donna Justice	Adm. Clerk
Phyllis Tackett	Acct. Clerk
Fayetta Stanley	Secretary/Path.
James Rich	Clerk/Pharm.
John Peters	R. T. Aide
Lowell Adkins	Watch Engineer
Nancy Anderson	Clerk/Purch.
Barbara Austin	Adm. Clerk
Barbara Branham	Aide
Bonnie Branham	Aide
Donna Chapman	Ward Clerk
Ruth Coleman	Aide/C.S.S.
Sheila Coleman	Aide
Billy Dotson	Adm. Clerk
Freddie Fouts	Janitor
Karen Hall	Aide

Sheila Hall	Clerk/Acct.
Ethel Holsinger	Superv. Hskp.
Maxine Kendrick	Aide
Velva Justice	Aide
Mary M. Maynard	Aide
Jean Stanley	Ins. Clerk
Rick Thacker	Watchman
Virginia Williams	Aide
Bonnie Rooks	Aide
Bessie Mullins	Aide
Ruby Scott	Aide
Rosemary Coleman	O. R. Tech.
Helen Maynard	Aide
Debbie Sowards	O. R. Tech.
Hattie Parsons	Maid
Naomi Hamilton	Maid
Irene Thacker	Maid
Bernie Thacker	Maid
Fayetta Sweeney	Maid
Ada Woodall	Maid
Betty Kinney	Kitchen Helper
Willie Caldwell	Aide
Drew Taylor	Watchman
Erma Taylor	Aide
Raymond Wright	Janitor
Curt Wallace	Watch Engineer
Helen Williams	Aide
Lois Hall	Aide
Dolly Mullins	Maid
Brenda Robinson	Ward Clerk
Julia Spencer	Ward Clerk
Lana Luster	Business Office
Jerry Lakin	Orderly
Katheryn Prater	Pharmacy Tech.

Verdia Fields	Coffee Shop
Louise Damron	Pharmacy Tech.
Peggy Skeens	Business Office
Bonnie Hamilton	Aide
Bernice Hall	Business Office
Lenora Bentley	Business Office
Bruce Honaker	Janitor
Opal Farmer	Maid
Jerline Tucker	Ward Clerk
Christine Murphy	Aide
Bonnie Kinney	Aide
Belle Kiser	Business Office
Ricky Ratliff	Orderly
Anna Newsome	Pharmacy Tech.
Lurcy Kendrick	Coffee Shop
Mavis Ison	Aide/CSS
Eugene King	Maintenance

APPENDIX B

INDIVIDUALS WHO WALKED OFF JOB JUNE 1972 BUT WERE REHIRED

Bessie Mullins	Jerline Tucker
Ruby Scott	Brenda Robinson
Rosemary Coleman	Christine Murphy
Helen Maynard	Julia Spencer
Debbie Sowards	Bonnie Kinney
Hattie Parsons	Lana Luster
Naomi Hamilton	Belle Kiser
Irene Thacker	Jerry Lakin
Bernie Thacker	Ricky Ratliff
Fayetta Sweeney	Katheryn Prater

Ada Woodall	Anna Newsome
Betty Kinney	Verdia Fields
Willie Caldwell	Lurcy Kendrick
Drew Taylor	Louise Damron
Erma Taylor	Mavis Ison
Bernice Hall	Peggy Skeens
Lenora Bentley	Eugene King
Bruce Honaker	Bonnie Hamilton
Opal Farmer	

APPENDIX C

	Name	Position	Date of Hire
1.	Shirley Sweaney	Darkroom Hlpr.	10/14/74
2.	Fay Ann Elkins—NLE	Kitchen Helper	10/24/74
3.	John O'Brien—NLE	Gen. Maint.	10/14/74
4.	Michael Elkins	Watch Engineer	10/18/74
5.	Lizzie Frasure	Maid	10/21/74
6.	Shirley Hylton	Maid	10/28/74
7.	Barbara K. Ratliff—NLE	Clerk	10/28/74
8.	Betty Hurd—NLE	Waitress	10/29/74
9.	Hobert E. Little—NLE	Sec. Police	11/1/74
10.	Iva Potter—NLE	Kitchen Helper	11/4/74
11.	Virginia Mulliken	R.N.	11/6/74
12.	Gerald Taylor	Orderly	11/7/74
13.	Stanley D. Gray—NLE	Dishwasher	11/9/74
14.	Peggy Chaffins—NLE	Clerk	11/11/74
15.	Claude Stamper—NLE	Carpenter	11/11/74
16.	Bonnie J. Cook—NLE	Clerk	11/15/74
17.	Violet S. Johnson—NLE	Kitchen Helper	11/15/74
18.	Patricia E. Nordall—NLE	Kitchen Helper	11/15/74
19.	Ella Mavis Justice	Clerk	11/18/74
20.	Beatrice Carter	Nurse Aide	11/18/74

	Name	Position	Date of Hire
21.	Margaret Corder	Nurse Aide	11/20/74
22.	Mary M. Worrix	Maid	11/20/74
23.	Pamela Sue Brown—NLE	Kitchen	11/22/74
24.	Jacqueline Bentley—NLE	Ward Clerk	11/25/74
25.	Chinnamma Thomas—NLE	G.N.	11/25/74
26.	Vickie Slone—NLE	Cashier	11/27/74
27.	Rita Carter	Information Clerk	11/19/74
28.	Debbie L. Ratliff—NLE	Nurse Aide	11/27/74
29.	Randolph Maynard—NLE	Orderly	11/27/74
30.	John D. Elliott (S)	Orderly	11/28/74
31.	Helen E. Carter (S)	Nurse Aide	11/27/74
32.	Deborah Branham (S)	Nurse Aide	11/26/74
33.	Virginia Ratliff	Salad Girl	11/25/74
34.	Roberta Meadows	Kitchen Helper	12/3/74
35.	Margaret S. Smith (S)—NLE	Nurse Aide	12/21/74
36.	Melisa Black (S)	Nurse Aide	12/2/74
37.	Elvis Ngolle (S)—NLE	Dishwasher	12/3/74
38.	Jammetta Mounts—NLE	Med. Tech.	12/3/74
39.	Karen L. Adkins	Kitchen Helper	12/9/74
40.	Mary McKinney—NLE	Nurse Aide	12/7/74
41.	Iva Lee Adkins—NLE	Kitchen Helper	12/16/74
42.	Earl W. Smith—NLE	Gen. Maint.	12/16/74
43.	Evolene Armitage—NLE	Kitchen Helper	12/17/74
44.	Phyllis Ann Kirk	Nurse Aide	12/17/74
45.	Barbara Meredith	Nurse Aide	12/11/74
46.	Charles Coleman (S)—NLE	Orderly	12/18/74
47.	Joan Elkins (S)--NLE	Nurse Aide	12/21/74
48.	Mary Mullins (S)—NLE	Nurse Aide (Now)	12/21/74
49.	Margaret L. Shockey	Nurse Aide (R.N.)	12/22/74
50.	Roberta Thomas (S)	Nurse Aide	12/21/74
51.	John R. Johnson (S)—NLE	Orderly	12/21/74
52.	Rita Wright (S)—NLE	Nurse Aide	12/22/74
53.	Arlena Hall (S)	Nurse Aide	12/21/74

	Name	Position	Date of Hire
54.	Andy Zimmerman—NLE	Orderly	12/24/74
55.	Mary V. Evans (S)	Clerk	12/24/74
56.	Lucy Hall	Maid	12/26/74
57.	Sandra Hester—NLE	Nurse Aide	12/30/74
58.	Thomas Gilbert, Jr. (S)—NLE	Orderly	12/30/74
59.	Liza J. Kidd	Nurse Aide	12/30/74
60.	Emmett Bugg (S)	Orderly	12/30/74
61.	Marsha Cook (S)—NLE	PBX Operator	12/25/75
62.	Joyce D. Adkins	Maid	12/30/74
63.	Betty Christian—NLE	Aide	1/27/75
64.	Virginia L. Vance	Aide	1/6/75
65.	Elizabeth Potter—NLE	Clerk	1/3/75
66.	Roger Justice—NLE	Sec. Police	1/4/75
67.	Rhonda K. Coleman	Clerk	1/2/75
68.	Teresa J. Cox—NLE	Ward Clerk	1/3/75
69.	Margaret Adkins	Maid	1/9/75
70.	Colleen Stapelton	Technician 1	1/20/75
71.	Diane L. Owens	Nurse Aide	1/2/75
72.	Margaret Ellison	Ward Clerk	1/13/75
73.	Thelma Johnson—NLE	Kitchen Helper	1/9/75
74.	Doris Niece—NLE	Secretary	1/7/75
75.	Sara L. Charles—NLE	Kitchen Helper	1/10/75
76.	Sandra Meade—NLE	Clerk	1/13/75
77.	Priscilla Flanary	Nurse Aide	1/13/75
78.	Wanda Sue James	Path. Helper	1/20/75
79.	Rita Barnes	Secretary	1/20/75
80.	Mary E. Perry—NLE	L.P.N.	1/15/75
81.	Joy Lawson	Maid	1/10/75
82.	Janiv Blackburn—NLE	Kitchen Helper	1/6/75
83.	Edith Fraley	Cashier	1/20/75
84.	Brenda Simpson—NLE	Kitchen Helper	1/21/75
85.	Mary L. Damron	Maid	1/23/75

	Name	Position	Date of Hire
86.	Carol A. Fulford—NLE	Nurse Aide	1/30/75
87.	Kermit Don Gibson	Orderly	1/6/75
88.	Ronald W. Ashby	Watch Engineer	2/10/75
89.	Jeffrey L. Blackburn	Orderly	2/22/75
90.	Charles S. Caudill	Psychologist	2/10/75
91.	Lillian Allen	Nurse Aide	2/3/75
92.	Roxie Bowling	Nurse Aide	2/3/75
93.	Anna Burke	Nurse Aide	2/3/75
94.	Meleathie Harmon	Nurse Aide	2/3/75
95.	Caroline Johnson	Nurse Aide	2/3/75
96.	Virgie Niece—NLE	Nurse Aide	2/3/75
97.	John Weddington	Orderly	2/3/75
98.	Joyce A. Slone	Nurse Aide	2/3/75
99.	Bertha Williams	Nurse Aide	2/3/75
100.	Oscar Adkins—NLE	Orderly	2/3/75
101.	Penny Amos	Nurse Aide	2/3/75
102.	Lola Collins	Nurse Aide	2/3/75
103.	Patricia Honaker	Nurse Aide	2/3/75
104.	Burnease Perry—NLE	Nurse Aide	2/3/75
105.	Brenda Owens—NLE	Kitchen Helper	2/6/75
106.	James A. Dotson—NLE	Watch Engineer	2/7/75
107.	Sue Shadoan—NLE	Ward Clerk	2/1/75
108.	Martha Ashby—NLE	Ward Clerk	2/1/75
109.	Phyllis Simpkins	Ward Clerk	2/2/75
110.	Inez Kinney	Ins. Clerk	2/17/75
111.	Rachael Campbell—NLE	Ward Clerk	2/1/75
112.	Virginia Ratliff—NLE	Ward Clerk	2/1/75
113.	Louetta Johnson	Ward Clerk	2/3/75
114.	Mary F. Johnson	Ward Clerk	2/1/75
115.	Wanda Hawley—NLE	Cashier	2/17/75
116.	Anita C. McCoy—NLE	Nurse Aide	2/24/75
117.	Ruby Wallace—NLE	Clerk	2/17/75

	Name	Position	Date of Hire
118.	Bennie F. Hall	Carpenter	2/24/75
119.	Vivian Newsom	Cashier	2/20/75
120.	Geneva Thacker—NLE	Kitchen Helper	2/24/75
121.	Clova Adkins—NLE	Cook's Helper	2/24/75
122.	Lincoln Biliter—NLE	Sec. Police	2/26/75
123.	Arlene Piccolo	Stenographer	2/17/75
124.	Rosie Justice—NLE	Kitchen Helper	3/1/75
125.	Janice Flanary—NLE	Kitchen Helper	3/3/75
126.	Janet Campbell—NLE	Med. Tech. Student	3/7/75
127.	Sharon Young	Kitchen Helper	3/7/75
128.	Ruby Potter	Maid	3/5/75
129.	Tommy Shelton—NLE	Sec. Police	3/8/75
130.	Lavern Coleman—NLE	Cashier	3/11/75
131.	Pearl Davis	Maid	3/13/75
132.	Evalee Stewart	Kitchen Helper	3/22/75
133.	Virginia L. Caudill	PBX Operator	3/26/75
134.	Lois Simmons—NLE	Clerk	3/31/75
135.	Bessie Dennis	Kitchen Helper	3/28/75
136.	Gail E. Thacker—NLE	Clerk	3/31/75
137.	Pauline Huffman—NLE	Ward Clerk	3/31/76
138.	Joseph Newsome	Sec. Police	4/7/75
139.	Glennis Varney	Maid	4/4/75
140.	Henrietta Lowe	Cook's Helper	4/8/75
141.	Sara F. Cantrell	Secretary	4/8/75
142.	Ruby Perrine	Clerk	4/9/75
143.	Opal Sykes—NLE	Coffee Shop	4/9/75
144.	Stephen L. Roberts—NLE	Clerk	4/11/75
145.	Neri P. Allen—NLE	Gen. Main.	4/11/75
146.	Loretta McCauley—NLE	Kitchen Helper	4/11/75
147.	Gary B. Gilmet	Sec. Police	4/21/75
148.	Tresha L. Combs—NLE	Kitchen Helper	4/17/75
149.	Virgie Johnson—NLE	L.P.N.	4/21/75
150.	Kathleen Morrison	Maid	4/24/75

	Name	Position	Date of Hire
151.	Elene B. Reese	Maid	4/28/75
152.	Butch Paige—NLE	Aide	4/23/75
153.	Mae Jones—NLE	Kitchen Helper	4/24/75
154.	Rosie Wright—NLE	Kitchen Helper	4/28/75
155.	Mary Ratliff—NLE	C.S.S. Helper	4/28/75
156.	Roxie Justice	Kitchen Helper	4/30/75
157.	Linda Ferrell	C.S.S. Helper	4/14/75
158.	Kathy Dye—NLE	Clerk	5/3/75
159.	Peggy Crase	Kitchen Helper	5/3/75
160.	Edith C. Bajar	G.N.	5/5/75
161.	Zenaida H. Jularbal	G.N.	5/5/75
162.	Barbara Blevins	Maid	5/12/75
163.	Kathy Osborne	Ward Clerk	5/9/75
164.	Mildred Burke	Kitchen Helper	5/13/75
165.	Lyn Riley Combs—NLE	Nurse Aide	5/9/75
166.	Lola J. Coleman	Maid	5/10/75
167.	Kathy Collins (S)—NLE	Nurse Aide	5/9/75
168.	Jerry C. Ratliff	Clerk	5/12/75
169.	Dolly T. Hensley—NLE	Kitchen Helper	5/15/75
170.	Sharon Arnette	Maid	5/15/75
171.	Julia A. Spencer—NLE	Clerk	5/19/75
172.	Barry A. Stevens—NLE	Clerk	5/19/75
173.	Margaret J. Akers	R.N.	5/26/75
174.	Debra Little	R.N.	5/26/75
175.	Ellen Woods	R.N.	5/26/75
176.	Patty Collins	R.N.	5/26/75
177.	Chinwe Obidike (S)—NLE	Kitchen Helper	5/17/75
178.	Alice Burdsal (S)—NLE	Aide	5/19/75
179.	Garnet Conn (S)—NLE	Nurse Aide	5/17/75
180.	Anice Lee Stumbo	R.N.	5/22/75
181.	Nellie V. Hall	Coffee Shop	5/21/75
182.	Lear Marie Cantrell	Kitchen Helper	5/26/75

	Name	Position	Date of Hire
183.	Arlena Hall (S)	Nurse Aide	5/21/75
184.	Karen Justice (S)—NLE	Nurse Aide	5/19/75
185.	Linda Irene Walters (S)—NLE	Nurse Aide	5/26/75
186.	Billie K. Coleman—NLE	Technician 1	5/27/75
187.	Shirley E. Coleman	R.N.	5/26/75
188.	Janie T. Amick	R.N.	5/28/75
189.	Ronald Bryant—NLE	Gen. Maint.	5/28/75
190.	Lou Ann Slife	Ins. Clerk	5/27/75
191.	Teresa A. Coleman—NLE	Clerk	6/2/75
192.	Reba J. Hamilton	Ward Clerk	6/2/75
193.	Josephine Ray—NLE	Clerk	6/2/75
194.	Anna Potter	Nurse Aide	6/2/75
195.	Sue Easterling	Clerk	6/4/75
196.	Karen Faye Ray—NLE	Nurse Aide	6/2/75
197.	Nellie Dawahare—NLE	Nurse Aide	6/3/75
198.	Sharlene Muncy	Nurse Aide	6/9/75
199.	Linda Harley	Stenographer	6/9/75
200.	Celia Alexander	Nurse Aide	6/9/75
201.	Pamela Coleman—NLE	Aide	6/9/75
202.	Joan Trimble	R.N.	6/16/75
203.	Danna S. Walters	Therapist	6/11/75
204.	Glenda Allen	R.N.	6/16/75
205.	Ruby Hess—NLE	Kitchen Helper	6/14/75
206.	Paulette Jones	R.N.	6/16/75
207.	Shelby J. Ray	Kitchen Helper	6/16/75
208.	A. Robert Morrison	Clerk	6/16/75
209.	Robert W. Mullins	Gen. Main.	6/16/75
210.	Freda Campbell	Clerk	6/15/75
211.	Deborah L. Smith	Clerk	6/19/75
212.	Velma S. Smith	Clerk	6/20/75
213.	Paul Bevins	Watch Engineer	6/24/75
214.	Patty S. Smith	Kitchen Helper	6/25/75

	Name	Position	Date of Hire
215.	Rebecca Samons—NLE	X-Ray Tech.	6/23/75
216.	Deloris Brooks	L.P.N.	6/30/75
217.	Josephine Fields	L.P.N.	6/30/75
218.	Brenda Lawson	L.P.N.	6/30/75
219.	LaVerne Casey	L.P.N.	6/30/75
220.	Linda Stevens	L.P.N.	6/30/75
221.	Zuann Morris	L.P.N.	6/30/75
222.	Mary B. Gilmet—LOA	C.S.S. Helper	6/30/75
223.	Wanda Stanley	L.P.N.	6/30/75
224.	Diana Owens	R.N.	6/30/75
225.	Sue Keene—NLE	Gen. Helper	6/30/75
226.	Lois Jones	R.N.	7/7/75
227.	Dorothy Mullins	Kitchen Helper	7/5/75
228.	Lizzie G. Howell—NLE	Maid	7/8/75
229.	Kathy Asher	Clerk	7/6/75
230.	Della M. Ray	Clerk	7/8/75
231.	Dariel Ratliff	Kitchen Helper	7/9/75
232.	Clara Rowe	Kitchen Helper	7/9/75
233.	Catherine Kendrick	Nurse Aide	7/4/75
234.	Ellen Johnson	L.P.N.	7/14/75
235.	Polly Campbell	L.P.N.	7/14/75
236.	Kathy Jacobs	L.P.N.	7/14/75
237.	Della Childers	L.P.N.	7/14/75
238.	Dinah R. Bevins	L.P.N.	7/14/75
239.	Debra Shelton	L.P.N.	7/14/75
240.	Norman Wells	L.P.N.	7/14/75
241.	Dianna Ousley—NLE	L.P.N.	7/14/75
242.	Katheryn Tackett	Nurse Aide	7/17/75
243.	Anita L. Bridges—NLE	Transp. Aide	7/21/75
244.	Ollie M. Collins	Kitchen Helper	7/22/75
245.	Betty Downs	Technician 1	7/29/75
246.	Florence Mitchell	R.N.	7/28/75

	Name	Position	Date of Hire
247.	Linda Saylor	R.N.	8/4/75
248.	Tina Collins	Cashier	8/4/75
249.	Deborah Elkins	Aide/Clerk	8/4/75
250.	Christine Hermecke	Stenographer	8/6/75
251.	Della Skow	Clerk	8/6/75
252.	Gary Kendrick	Clerk	8/4/75
253.	Joyce A. Adkins	Transp. Aide	8/11/75
254.	William Thacker	Dishwasher	8/10/75
255.	Perry Kendrick	Sec. Police	8/9/75
256.	Brenda Watson	Aide	8/6/75
257.	Dorothy Roberts	Maid	8/12/75

CODE:

NLE—No Longer Employed
LOA—Leave of Absence
S —Student

APPENDIX D

INDIVIDUALS EMPLOYED SINCE AUGUST 12, 1975

1.	Dorothy Roberts	Housekeeping	Maid
2.	Robbie Newsome	Nursing	R.N. T
3.	Janice Slone	Nursing	R.N.
4.	Marcella Charles	Med Rec.	Clerk T
5.	Maudie May	Pharmacy	Tech.
6.	Mavis Justice	Admissions	Clerk
7.	Emelene Hunter	Housekeeping	Maid
8.	Debbie Regehr	Nursing	R.N.
9.	Wanda Blackburn	Nursing	L.P.N.
10.	Sydney Phillips	Nursing	L.P.N.
11.	Henrietta Morrison	Nursing	Nurse Aide T

12.	Pamela Blackburn	Nursing	Nurse Aide
13.	Cathy Lee	Nursing	Nurse Aide
14.	Carl Stewart Jr.	Nursing	Orderly T
15.	Janice Huffman	Nursing	Nurse Aide T
16.	Debbie Harrision	Nursing	Nurse Aide
17.	Okra Mullins	Nursing	Nurse Aide T
18.	Mike Jones	Nursing	Orderly T
19.	Carol May	Nursing	Nursing
20.	Emmie J. Looney	Nursing	Nurse Aide T
21.	Helen Ratliff	Nursing	Nurse Aide
22.	Joyce Mullins	Nursing	Nurse Aide
23.	Barbara Damron	Nursing	Nurse Aide
24.	Kelsie Billiter	Nursing	Nurse Aide
25.	Maudie Porter	Dietary	Coffee Shop T
26.	William McCoy	Pharmacy	Pharmacist
27.	Jeanette Robinson	X-Ray	Dkrm. Helper T
28.	Shelby Morley	Admissions	Clerk
29.	Katherine Parker	Nursing	L.P.N.
30.	Pamela Prater	Nursing	C.S.S.
31.	Beverly Venters	Laboratory	Med. Tech.
32.	Lana Luster	Accounting	Clerk
33.	Hillard Burke	Maintenance	Gen. Maint.
34.	Mary E. Yates	Dietary	Coffee Shop T
35.	Brenda Varney	Nursing	Ward Clerk T
36.	Phyllis Wright	Dietary	Kit. Helper
37.	Sherry Fought	Admissions	Clerk
38.	Mary N. Lawson	Dietary	Kit. Helper T
39.	Ernest Bentley	Maintenance	Gen. Maint.
40.	Linda O'Quinn	Nursing	C.S.S.
41.	Hazel Bartley	Nursing	L.P.N.
42.	Roberta Robinson	Med. Rec.	Clerk
43.	Reva Harris	Med. Rec.	Stenographer T
44.	Paul Kinney	Maintenance	Painter

45.	Jimmy Crowden	Data Processing	Key Punch Op.
46.	Rush Gullett	Security	Police T
47.	Curtis Muncie	Security	Police
48.	Jeannene Smith	Housekeeping	Maid
49.	Mabel Robinson	Housekeeping	Maid T
50.	Ethel Akers	Nursing	Nurse Aide
51.	Loretta Winstead	Nursing	L.P.N.
52.	Ella M. McCary	Housekeeping	Maid
53.	Marcia Bailey	Accounting	Ins. Clerk
54.	Shirley Compton	Laboratory	Med. Tech.
55.	Bobbi Potter	X-Ray	Aide T
56.	Vernon Baker	Resp. Therapy	Tech. T
57.	Ellen Charles	Dietary	Kit. Helper T
58.	Aloma Lusk	Housekeeping	Maid T
59.	Monica Gilley	Phy. Therapy	Aide
60.	Josephene Osborne	Dietary	Coffee Shop
61.	Teresa Sesco	Nursing	Nurse Aide
62.	Shelia Westfall	Pathology	Cytotech.
63.	Waunita Morgan	Dietary	Coffee Shop
64.	Gregory Pinson	Dietary	Dishwasher T
65.	Eunice Gullett	Nursing	Nurse Aide
66.	Joann Burke	Housekeeping	Maid
67.	Mary Blair	Dietary	Kit. Helper
68.	Deborah Stanley	Med. Rec.	Clerk
69.	Railey Coleman	Security	Police
70.	Janet Stapleton	Nursing	Nurse Aide
71.	Inez Smith	Housekeeping	Maid
72.	Doris Stiltner	Dietary	Kit. Helper
73.	Florene Osborne	Dietary	Dishwasher T
74.	Reggie Hickman	Resp. Therapy	Tech.
75.	Jerry Sexton	Nursing	Orderly
76.	Walter D. Robinson	Security	Police
77.	Brenda Franklin	Phy. Therapy	Aide
78.	June Clevenger	Nursing	Nurse Aide

79.	Charlotte Burke	Dietary	Kit. Helper T
80.	Lynn Hodson	Resp. Therapy	Tech.
81.	John P. Compton	Public Relations	
82.	Don Branham	Maintenance	Painter
83.	Rose Karen Sergent	Nursing	Secretary
84.	Mabel Milam	Dietary	Coffee Shop
85.	Janice Isaac	Nursing	Nurse Aide T
86.	Mary A. Adams	Nursing	Nurse Aide T
87.	Mary Crittendon	Nursing	Nurse Aide T
88.	Annette Gooslin	Nursing	Nurse Aide T
89.	Janet Thomas	Pharmacy	Tech.
90.	Karen F. Ray	Nursing	Nurse Aide
91.	Justine Maynard	Dietary	Kit. Helper
92.	Joey Habern	Nursing	Orderly
93.	Judy K. Thacker	Laboratory	Med. Tech.
94.	Glendene Montgomery	Admissions	Clerk
95.	Joyce Thompson	Nursing	Nurse Aide
96.	Robert H. Noe	Anesthesia	Anesthetist
97.	Sherill Blackburn	Nursing	Ward Clerk
98.	Brenda Hausauer	Nursing	Nurse Aide
99.	Richard Meek	Maintenance	Helper
100.	Elaine Chaffins	Resp. Therapy	Aide
101.	Dorsielean Reynolds	X-Ray	Dkrm. Helper
102.	Delbert Snodgrass	Dietary	Dishwasher
103.	Edith Edmonds	Housekeeping	Maid
104.	Edna Taylor	Housekeeping	Maid
105.	Teresa Luttrell	Nursing	Nurse Aide
106.	Hasadora Reynolds	Maintenance	Gen. Maint.
107.	Elsie Collins	Nursing	Nurse Aide
108.	Reba J. Hamilton	Nursing	Nurse Aide
109.	Janice Cool	Med. Rec.	Clerk
110.	Zella Hackett	Dietary	Kit. Helper
111.	Joyce F. Adkins	Admissions	Clerk

112.	Nila J. Estep	Dietary	Kit. Helper
113.	Alberta Gibson	Med. Rec.	Clerk
114.	Luther Lidster	Security	Police
115.	Ronnie P. Newsome	Admissions	Clerk
116.	Lincoln Biliter	Security	Police
117.	Kathy Ward	Nursing	L.P.N.

APPENDIX E

Arlena Adkins
Nona Akers
Lola Anderson
Roberta Bolton
Louise Bartley
Luna Bevins
Shirley Birchfield
Alice Blankenship
Ruth Blankenship
Frankie Blair
Shirley Brewer
Eloise Bumgardner
Ann Burgess
Opal Burns
Mary Canada
Alpha Carroll
Minnie Carroll
Shirley Carroll
Irene Charles
Marilyn Charles
Hazel Coleman
Larry Coleman
Lola Coleman
Lois Coleman
Berma Hopkins
Kathleen Howell
Pearl Howell
Pat Hamilton
Shirley Harmon
Betty Hughes
Louise Huffman
Patricia Iricks
Dorothy James
Mable James
Mary Ann James
Johnny Johnson
Nine Johnson
Mary J. Jordan
Audrey Justice
Pebble Justice
Mike Justice
Sandra Justice
Anna King
Peggy King
Glema Kinney
Ruby Kinney
Phyllis Layne
Joe Donald Little

Marie Comer
Evelyn Compton
Maxine Courtney
Phyllis Cummins
Erika Caldwell
Elwood Charles
Kathryn Chaney
Joe Dotson
Jeanette Elswick
Anna Mae Fields
Nancy Fields
Brenda France
James Flowers
Mae Fleming
Cora Gibson
Lue Vicie Gibson
Phyllis Gibson
Wilma Reid
John Gray
Frances Greer
Jettie Griffey
Mona Hamilton
Judy Hampton
Faye Haynes
Laura Hinkle
Elizabeth Honaker
Ruby Prater
Eloise Pyle
Alpha Ratliff
Hazel Ratliff
Josephine Ratliff
Rhonda Ratliff
Velva Ratliff
Martha Ray

Martha Little
Bernice Mason
Helen Maynard
Judy Maynard
Lonnie Maynard
Verda L. Maynard
Rebecca Maynard
Winfred Maynard
Johnny Mattingly
Eunice McCoy
Albert Meade
Mentie Meade
Tennie Meade
Roger Meade
Beatrice Moore
Bethel Mullins
Mervil Mullins
Wanda Mullins
Deborah Mullins
Carolyn Justice
William Parsons
Geneva Pauley
Eileen Phillips
Juanita Phillips
Oler Phillips
Norma Prater
Rondle Gene Bowens
Danny Coleman
Juanita Lewis
Martha Hall
Betty Weddington
Donna Justice
Phyllis Tackett
Fayetta Stanley

Arvid Reynolds	James Rich
Causby Reynolds	John Peters
Mary Ellen Roberts	Lowell Adkins
Geraldine Robinette	Nancy Anderson
Peggy Robinette	Barbara Austin
Johnny Robinson	Barbara Branham
Virginia Ratliff	Bonnie Branham
Woody Ratliff	Donna Chapman
Gertrude Robinson	Ruth Coleman
Lurla Scott	Sheila Coleman
Nancy Scott	Billy Dotson
Hatler Sexton	Freddie Fouts
Clemia Smith	Karen Hall
Frieda Smith	Shelia Hall
Flossie Stanley	Ethel Holsinger
Bobby Tackett	Maxine Kendrick
Anna Sagraves	Velva Justice
Carrie Stratton	Mary M. Maynard
Bertha Taylor	Jean Stanley
Bonnie Thacker	Rick Thacker
Fayetta Thacker	Virginia Williams
Inis Thompson	Bonnie Rooks
Josephine Thacker	Edith Williams
Elsie Thacker	Janice Wood
Ruth Thacker	Lorraine Woods
Brenda Thompson	Emoline Warrix
Emoline Thompson	Robert Wray
Maudie Thompson	Raymond Wright
Shirley Vance	Curt Wallace
Eddie Vanover	Helen Williams
Lola Wallace	Lois Hall
Ardena Wheeler	Dolly Mullins

APPENDIX F

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board
An Agency of the United States Government

We Will Not discourage membership in Communications Workers of America, AFL-CIO, or any other labor organization, by failing or refusing to reinstate any employees who have engaged in a lawful strike, after application for reinstatement has been made, to positions as they become vacant without prejudice to such employees' seniority and other rights and privileges, or by otherwise discriminating against any of our employees in regard to their hire, tenure of employment, or other terms or conditions of their employment.

We Will Not in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act.

We Will offer to all those employees listed below immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and We Will make them whole for any loss of earnings they suffered as a result of the discrimination against them.

Arlena Adkins
Nona Akers
Lola Anderson
Roberta Bolton
Louise Bartley
Luna Bevins
Shirley Birchfield
Berma Hopkins
Kathleen Howell
Pearl Howell
Pat Hamilton
Shirley Harmon
Betty Hughes
Louise Huffman

Alice Blankenship
Ruth Blankenship
Frankie Blair
Shirley Brewer
Eloise Bumgardner
Ann Burgess
Opal Burns
Mary Canada
Alpha Carroll
Minnie Carroll
Shirley Carroll
Irene Charles
Marilyn Charles
Hazel Coleman
Larry Coleman
Lola Coleman
Lois Coleman
Marie Comer
Evelyn Compton
Maxine Courtney
Phyllis Cummins
Erika Caldwell
Elwood Charles
Kathryn Chaney
Joe Dotson
Jeanette Elswick
Anna Mae Fields
Nancy Fields
Brenda France
James Flowers
Mae Fleming
Cora Gibson
Lue Vicie Gibson
Phyllis Gibson
Patricia Iricks
Dorothy James
Mable James
Mary Ann James
Johnny Johnson
Nine Johnson
Mary J. Jordan
Audrey Justice
Pebble Justice
Mike Justice
Sandra Justice
Anna King
Peggy King
Glema Kinney
Ruby Kinney
Phyllis Layne
Joe Donald Little
Martha Little
Bernice Mason
Helen Maynard
Judy Maynard
Lonnie Maynard
Verda L. Maynard
Rebecca Maynard
Winfred Maynard
Johnny Mattingly
Eunice McCoy
Albert Meade
Mentie Meade
Tennie Meade
Roger Meade
Beatrice Moore
Bethel Mullins
Mervil Mullins

Wilma Reid
John Gray
Frances Greer
Jettie Griffey
Mona Hamilton
Judy Hampton
Faye Haynes
Laura Hinkle
Elizabeth Honaker
Ruby Prater
Eloise Pyle
Alpha Ratliff
Hazel Ratliff
Josephine Ratliff
Rhonda Ratliff
Velva Ratliff
Martha Ray
Arvid Reynolds
Causby Reynolds
Mary Ellen Roberts
Geraldine Robinette
Peggy Robinette
Johnny Robinson
Virginia Ratliff
Woody Ratliff
Gertrude Robinson
Lurla Scott
Nancy Scott
Hatler Sexton
Clemia Smith
Frieda Smith
Flossie Stanley
Bobby Tackett
Anna Sagraves

Wanda Mullins
Deborah Mullins
Carolyn Justice
William Parsons
Geneva Pauley
Eileen Phillips
Juanita Phillips
Oler Phillips
Norma Prater
Rondle Gene Bowens
Danny Coleman
Juanita Lewis
Martha Hall
Betty Weddington
Donna Justice
Phyllis Tackett
Fayetta Stanley
James Rich
John Peters
Lowell Adkins
Nancy Anderson
Barbara Austin
Barbara Branham
Bonnie Branham
Donna Chapman
Ruth Coleman
Sheila Coleman
Billy Dotson
Freddie Fouts
Karen Hall
Sheila Hall
Ethel Holsinger
Maxine Kendrick
Velva Justice

Carrie Stratton	Mary M. Maynard
Bertha Taylor	Jean Stanley
Bonnie Thacker	Rick Thacker
Fayetta Thacker	Virginia Williams
Inis Thompson	Bonnie Rooks
Josephine Thacker	Edith Williams
Elsie Thacker	Janice Wood
Ruth Thacker	Lorraine Woods
Brenda Thompson	Emoline Warrix
Emoline Thompson	Robert Wray
Maudie Thompson	Raymond Wright
Shirley Vance	Curt Wallace
Eddie Vanover	Helen Williams
Lola Wallace	Lois Hall
Ardena Wheeler	Dolly Mullins

Methodist Hospital of Kentucky
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 3003, 550 Main Street, Cincinnati, Ohio 45202, Telephone 513—684-3663.

APPENDIX C

STATUTES INVOLVED

The provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 1792, 29 U.S.C. § 151, et seq.) relied upon by the Petitioner in this case are as follows:

Section 8 * * *

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a ma-

jority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

Section 10 * * *

"(e) The Board shall have power to petition any United States court of appeals, or if all the United States courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforc-

ing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

Supreme Court, U. S.
FILED
JUN 13 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1816

METHODIST HOSPITAL OF KENTUCKY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
and
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 17-38) is reported at ____ F.2d ____, 88 LC ¶11,971, and 103 LRRM 2875. That opinion was amended. (Pet. A, 34-35). The decisions and orders of the National Labor Relations Board and the administrative law judge (Pet. App. B, 36-102) are reported at 221 NLRB 692 and 227 NLRB 1392.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1980. The petition for writ of certiorari was filed on May 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether an employer may refuse to consider the employment applications of former striking employees on grounds of strike misconduct without identifying the applicants as having engaged in such misconduct.

STATEMENT OF THE CASE

The National Labor Relations Board found that petitioner violated Sections 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. §158(a)(1) and (3), by refusing to reinstate or consider for rehire employees who had participated in an economic strike. (Pet. App. B, 42-43). The strike began on June 10, 1972, and ended on October 10, 1974. Although petitioner was not covered by the Act at the beginning of the strike, the 1974 Health Care Amendments, 29 U.S.C. §152(2) and (14), brought it within the Act on August 24, 1974. (Pet. App. A, 17-18).

Petitioner refused to consider the post-strike employment application of any striker because of strike-related violence by unidentified individuals. (Pet. App. B, 52, 71). Although petitioner based its refusal to rehire strikers on the violence that occurred during the strike, it presented no evidence that any specific individual was guilty of violence or misconduct related to the strike. (Pet. App. A, 22-23; Pet. App. B, 60 n. 12, 71).

The court of appeals found, contrary to the Board, that petitioner had discharged the strikers before it came

under the Act and therefore had no obligation to offer strikers reinstatement to their former positions. (Pet. App. A, 25-31). However, the court agreed with the Board that petitioner had committed an unfair labor practice by categorically refusing to consider the applications of strikers for rehire as new employees. (Pet. App. A, 31-32). The court enforced the Board's order insofar as it concerned petitioner's refusal to consider the employment applications of strikers. (Pet. App. A, 32-33). This order required petitioner to cease and desist from its unfair labor practices, and, affirmatively, to make whole and offer employment to named persons who had been strikers. (Pet. App. B, 44-45, 74-76).

ARGUMENT

As the court of appeals noted (Pet. App. A, 31-32), this case is controlled by *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 181-85 (1941). Petitioner cannot refuse to rehire former employees because of their participation in protected activities. *Woodlawn Hospital v. NLRB*, 596 F.2d 1330, 1337 (7th Cir. 1979) (dictum).

Petitioner maintains that there is a conflict among circuits over whether an employer can refuse employment to a striker because of strike-related violence without showing that the particular striker was actually guilty of violence. Petitioner argues that, contrary to the decision in this case, the Fourth and Fifth Circuits would not require an employer to prove a particular individual participated in unprotected activity before discriminating against that individual. (Pet. 11-13).

There is, however, no conflict among the circuits on this question. It is a well established rule that before an employer can refuse reinstatement of a striker for strike misconduct, the employer must show that the striker was actually guilty of the misconduct. This rule is followed by

the U. S. courts of appeals, *e.g.*, *Mosher Steel Co. v. NLRB*, 568 F.2d 436, 441 (5th Cir. 1978); *Advance Industries Div.—Overhead Door Corp. v. NLRB*, 540 F.2d 878, 883 (7th Cir. 1976); *NLRB v. Sea-Land Service, Inc.*, 356 F.2d 955, 966-67 (1st Cir.), *cert. denied*, 385 U.S. 900 (1966), as well as by the National Labor Relations Board, *Markle Manufacturing Co.*, 239 NLRB No. 168 (1979).

In its petition to this Court and in the court of appeals, petitioner has relied on the Fifth Circuit decision in *Johns-Manville Products Corp. v. NLRB*, 557 F.2d 1126 (1977), *cert. denied*, 436 U.S. 956 (1978). In *Johns-Manville*, the court simply held that when employees engaged in an in-plant strike their jobs could be given to permanent replacements, just as in any other strike. 557 F.2d at 1133. At the same time, the court pointed out that while it was permissible to replace striking employees, it would be unlawful to discriminate against strikers by refusing to rehire them. 557 F.2d at 1133 n. 16.

In *NLRB v. Big Three Industrial Gas & Equipment Co.*, the Fifth Circuit emphasized that *Johns-Manville* applied only to replacement of in-plant strikers. 579 F.2d 304, 314 (1978), *cert. denied*, 440 U.S. 960 (1979). Speaking of post-strike sanctions, such as those imposed by petitioner in this case, the Court said, "Clearly, an employer punishing past wrongs must separate the guilty from the innocent". 579 F.2d at 314 n. 11. Petitioner has refused to make such a distinction.

The Fifth Circuit considered an employer's refusal to rehire certain strikers following incidents of misconduct during a strike in *NLRB v. Moore Business Forms, Inc.*, 574 F.2d 835 (1978). The court held that striking employees must be directly identified with misconduct if they are to be denied reemployment on that basis. 57[illegible]

F.2d at 843. Cited in support of this proposition was *NLRB v. Cambria Clay Products Co.*, 215 F.2d 48 (6th Cir. 1954), a Sixth Circuit decision cited by the Board in this case (Pet. App. B, 71 n. 21 and 22).

Petitioner also relies on *A. S. Abell Co. v. NLRB*, 598 F.2d 876 (4th Cir. 1979). In that case, an employer declined employment to a pressman who was a participant in the Washington Post strike until it could determine whether the pressman had participated in violence that occurred in that strike. The employee was not absolutely denied employment; hiring was simply delayed while the employer determined his participation, if any, in strike-related violence against his previous employer. 598 F.2d at 879. By contrast, petitioner has refused to determine whether any of the rejected applicants in this case had engaged in strike misconduct, preferring to deny them all employment simply because of their participation in the strike.

As the above discussion makes clear, it is an established rule under the National Labor Relations Act that an employee cannot be punished for strike misconduct without evidence that he actually engaged in misconduct. In this case, petitioner discriminated against past employees because of their participation in a strike without showing that any of them engaged in strike misconduct. This discrimination because of participation in protected union activity was properly held to be a violation of Sections 8(a)(1) and (3) of the Act. 29 U.S.C. §158(a)(1) and (3).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 1980

No. 79-1816

Supreme Court, U. S.
FILED
JUL 10 1980
MICHAEL RODAK, JR., CLERK

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NATIONAL LABOR RELATIONS BOARD

and

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

QUESTION PRESENTED

Whether the Board properly found that the Hospital violated Sections 8(a)(3) and (1) of the National Labor Relations Act by refusing to hire former strikers as new employees because of acts of strike misconduct, without identifying any particular striker as having engaged in such misconduct.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17-35) is not yet officially reported. The decisions and orders of the National Labor Relations Board (Pet. App. 36-102) are reported at 221 N.L.R.B. 692 and 227 N.L.R.B. 1392.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1980. The petition for a writ of certiorari was filed on May 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act ("the Act"), 29 U.S.C. 151 *et seq.*, are set out at Pet. App. 103-106.

STATEMENT

1. Petitioner Methodist Hospital of Kentucky, Inc. (the Hospital) operates a non-profit hospital in Pikesville, Kentucky, which serves as a regional medical center for a large and sparsely populated section of Eastern Kentucky and for adjoining areas in Virginia and West Virginia (Pet. App. 37; A. 192-193). In late 1971, the Communication Workers of America, AFL-CIO (the Union) requested that the Hospital recognize it as the collective bargaining representative of Hospital employees, asserting that over 90% of the employees had applied for Union membership (Pet. App. 53; A. 379). The Hospital denied the request on the ground that union representation was "not consistent with the purposes of the institution" (Pet. App. 53; A. 380-381).[1] In the spring

[1]Non-profit hospitals were exempt from coverage under the National Labor Relations Act prior to the enactment of the Health Care Amendments of 1974, Pub. L. No. 93-360, 88 Stat. 395 (Pet. App. 17-18, 42; A. 117-118).

of 1972, the National Labor Relations Board dismissed for lack of jurisdiction a Union petition seeking certification as the representative of the Hospital's non-professional employees (Pet. App. 53; A. 383-386).

On June 10, 1972, approximately 200 of the Hospital's over 400 employees went on strike in support of the Union's demand for recognition as the non-professional employees' collective bargaining representative (Pet. App. 42, 55-56; A. 118-119, 253, 248, 390, 371). During the strike, which continued for over two years (Pet. App. 18, 42; A. 118), unidentified individuals engaged in acts of violence and other serious misconduct (Pet. App. 22, 60; A. 224-225, 244, 207, 229-230, 226). Although it reinstated 37 strikers who applied for work during the strike (Pet. App. 22, 57; A. 218, 257-258, 167-168, 366), the Hospital denied reinstatement to all strikers who applied for work after the strike ended, on the ground that they had been terminated before the Hospital became subject to the Act (Pet. App. 56-57, 64-65; A. 210-213, 237, 451).[2] The Hospital also refused to rehire strikers who applied for work as new employees, on the dual grounds that there had been misconduct during the strike and that Hospital personnel policy forbade reemployment of any employee who left the job voluntarily without notice (Pet. App. 56-58; A. 220-223, 287-289, 406-428, 236-237, 241, 251-253, 207-209).

2. In response to the Union's unfair labor practices charge, the Board found that the Hospital had violated Sections 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by denying reinstatement to the strikers (Pet. App. 64-72, 42-43). In addition, the Board found that the Hospital had discriminatorily refused to hire the strikers

---

[2]The Health Care Amendments went into effect on August 25, 1974. The strike was discontinued on October 10, 1974.

as new employees, in violation of Sections 8(a)(3) and (1) of the Act (Pet. App. 43-44). The Board ordered the Hospital to cease and desist from these and other violations of employees' rights under the Act, to offer reinstatement to the strikers with backpay, and to post customary notices (Pet. App. 44-45, 74-102).

3. The court of appeals rejected the Board's finding that the Hospital violated the Act by denying reinstatement to strikers (Pet. App. 25-31, 32-33), but upheld the Board's finding that the Hospital discriminated against the strikers as new hires, in violation of Sections 8(a)(3) and (1) (Pet. App. 31-32). It then enforced the Board's order as modified.[3]

With respect to the Hospital's contention that it was justified in denying new employment to strikers because of strike misconduct, the court stated (Pet. App. 22-23; citations omitted):

> Our review of the record confirms the hospital's claim that there was substantial evidence of violence and misconduct in connection with the strike. * * * The difficulty, however, is that the proofs fail to identify any particular miscreant and the hospital has specifically declined to offer such proof.
>
> * * * * *
>
> While we would have no difficulty upholding a company decision to refuse employment to any person who was shown to have participated in the more egregious forms of unlawful conduct shown by the

---

[3]The court also upheld the Board's finding that the strike notice requirements of Section 8(g) of the Act, 29 U.S.C. 158(g), do not apply to strikes that began prior to the effective date of the Health Care Amendments (Pet. App. 20-22, 32). Although petitioner took a contrary view below (Pet. App. 19-20), it does not press that claim here.

proofs here, it is clear that the company has specifically declined to attribute any specific act to any specific employee, preferring to rely upon general allegations of misconduct. At the same time we are unwilling upon these proofs to disturb the well settled rule in our circuit that the vicarious imposition of sanctions for violence will not be enforced absent proof that a particular individual was engaged in the unprotected activity.

ARGUMENT

Contrary to the Hospital's contention (Pet. 11-13), the Sixth Circuit's conclusion that strikers may not permanently be denied employment because of unattributed acts of strike misconduct is in accord with settled authority. See in addition to the authorities cited by the court of appeals (Pet. App. 23), *NLRB* v. *Sea-Land Service*, 356 F. 2d 955, 966-967 (1st Cir.), cert. denied, 385 U.S. 900 (1966); *NLRB* v. *Valley Die Cast Corp.*, 303 F. 2d 64, 66-67 (6th Cir. 1962); *Advance Industries Division-Overhead Door Corp.* v. *NLRB*, 540 F. 2d 878, 883 (7th Cir. 1976); *NLRB* v. *Wichita Television Corp.*, 277 F. 2d 579, 585 (10th Cir.), cert. denied, 364 U.S. 871 (1960); *Int'l Ladies' Garment Workers Union* v. *NLRB*, 237 F. 2d 545, 551-552 (D.C. Cir. 1956).

The cases relied on by the Hospital (Pet. 11-12) do not point to a different conclusion. In *Johns-Manville Products Corp.* v. *NLRB*, 557 F. 2d 1126 (5th Cir. 1977), cert. denied, 436 U.S. 956 (1978), a divided panel of the Fifth Circuit held that widespread and extreme unattributed acts of sabotage during the bargaining process constituted, as a matter of law, an in-plant strike, and therefore justified an employee lockout and the hiring of permanent replacements. That issue is not present in this case since, as the court of appeals observed (Pet. App.

23), "the [H]ospital was able to hire replacement employees and remain in operation." Here, the question is whether once a strike is over a hospital can refuse to rehire strikers not specifically identified with strike misconduct. The *Johns-Manville* court did not reach that issue, though it acknowledged the general rule applied by the court of appeals in this case. 557 F. 2d at 1133 n.16. Moreover, the continuing vitality of *Johns-Manville* is suspect. In a subsequent case (*NLRB* v. *Big Three Industrial Gas & Equipment Co.*, 579 F. 2d 304, 313-316 (1978), cert. denied, 440 U.S. 960 (1979)), the Fifth Circuit suggested that *Johns-Manville* should be limited to its facts. "Courts have long been loathe to countenance an infliction of punishment upon many for the misdeeds of a few. * * * The exception created in *Johns-Manville* arose from extreme circumstances—circumstances threatening the economic survival of the plant and effectively denying its use to the employer." 579 F. 2d at 313-314.

A.S. Abell Co. v. *NLRB*, 598 F. 2d 876 (4th Cir. 1979), is similarly inapposite. There, an employer refused to hire a job applicant who, while employed elsewhere, had participated in a strike marked by violence, until it could determine whether the applicant was personally involved in the violence. In concluding that the employer did not thereby violate the Act, the Fourth Circuit did not reject the general rule that protected strikers cannot be denied employment because of their strike activity absent proof of individual misconduct. It merely permitted the employer to delay hiring for so long as was reasonably necessary to make an individualized determination.[4]

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[4]Nor is *NLRB* v. *Fansteel Metallurgical Corporation*, 306 U.S. 240, 252-261 (1939) (Pet. 15) inconsistent with the general rule. The acts of strike misconduct there were attributable to identified employees who seized the plant and refused to leave, and to those who aided and abetted them.

There is no merit to the Hospital's suggestion (Pet. 13-15) that it was free to deny employment to the strikers even after the effective date of the Health Care Amendments because some of the strike misconduct on which the denial was based occurred before the Hospital was brought under the Act's coverage. The Act proscribes discrimination, after the effective date of the Health Care Amendments, against employees of health care institutions aimed at encouraging or discouraging them from membership in a labor organization. 29 U.S.C. 158(a)(3). This proscription applies without regard for when an organizing effort begins or ends. Otherwise, an employer could defeat the congressional intent to afford the protections of the Act to health care employees simply by asserting that its employees engaged in union or concerted activities before the Amendments went into effect. Therefore, even though the court below upheld the Hospital's claim that it was free to deny strikers reinstatement to their former jobs because it had terminated them before it became subject to the Act's coverage (Pet. App. 25-31), the court properly held that the Hospital was not free, after the effective date of the Amendments, to refuse for discriminatory reasons to considered the strikers as new hires when jobs became available (Pet. App. 31-32).[5]

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[5]Nor is there merit to the Hospital's reliance (Pet. 13-14) on an asserted policy of denying reemployment to employees who "voluntarily * * * terminate" their employment without giving notice (A. 207-209, 438). Assuming *arguendo* that the strikers can be said to have voluntarily terminated their employment without notice by striking, the Hospital may not justify present employment discrimination against them by reference to such a policy. *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9, 16-17 (1962).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1980

DOJ-1980-07